

NOV 27 1976

MICHAEL RODAK, JR., CLERK

—IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-156**

**THE VENDO COMPANY**, a Missouri corporation,  
*Petitioner,*

vs.

**LEKTRO-VEND CORP.**, a Delaware corporation,  
**HARRY B. STONER** and  
**STONER INVESTMENTS, INC.**, a Delaware corporation,  
*Respondents.*

On Writ Of Certiorari To The United States Court  
Of Appeals For The Seventh Circuit

**RESPONDENTS' BRIEF**

**BARNABAS F. SEARS**  
One IBM Plaza  
Chicago, Illinois 60611

**JAMES E. S. BAKER**  
One First National Plaza  
Chicago, Illinois 60603

*Attorneys for Respondents*

Thomas L. Brejcha, Jr.  
Richard P. Rosenberg  
**BOODELL, SEARS, SUGRUE,**  
**GIAMBALVO & CROWLEY**  
One IBM Plaza - Suite 2650  
Chicago, Illinois 60611

James A. Hardgrove  
Clifford E. Yuknis  
**SIDLEY & AUSTIN**  
One First National Plaza - Suite 4700  
Chicago, Illinois 60603

*Of Counsel*

## INDEX

	PAGE
ADDITIONAL STATUTES INVOLVED .....	1
QUESTIONS PRESENTED .....	2
STATEMENT OF THE CASE .....	3
I.	
Vendo Employed Stoner And Acquired His Company (Stoner Mfg. Co.) As Part Of An Anticompetitive Scheme .....	5
A. Vendo's Preeminence In The Industry—Its Acquisitive Aims And Actions .....	5
B. Vendo's 1959 Acquisition Of Stoner Manufacturing And Its Employment Of Stoner .....	6
(1) The Acquisition Was Expressly Spurred By Vendo's Intent To Suppress Competition .....	6
(2) Vendo Secured FTC Approval By An Apparent Misrepresentation Of Competitive Facts .....	7
(3) Vendo Insisted Upon Elaborate Restraints Upon Competition—The Termination Provisions .....	7
(4) The Covenants Not To Compete Were Admittedly A Major Goal of The 1959 Transaction .....	9
(5) Vendo's Employment Of Stoner Was Itself But An Anticompetitive Device .....	10
C. Vendo's Refusal To Release Stoner And Its Failure To Terminate His Employment .....	11
(1) Vendo Refused Stoner's Request To Join The Lektro-Vend Venture .....	12
(2) Well Knowing Of Stoner's Aid To Lektro-Vend, Vendo Did Not Terminate Him, For Anticompetitive Reasons .....	12

D. Vendo "Negotiates" For The Purchase Of The Lektro-Vend Machine .....	13
(1) Pierson Requests Stoner To Intercede ..	13
(2) Vendo's Experts Disdain The Purchase ..	13
(3) Stoner Warns Vendo Of "A Serious Mistake" .....	13
(4) Chairman Pierson Personally Inspects—And Rejects—The Lektro-Vend Machine .....	14

## II.

Vendo Sued To Enforce Its Covenants, Pressed Claims It Knew To Be False, And Secured Judgments Which Were Ineradicably Tainted By The Underlying Anticompetitive Agreements .....	15
A. The Complaint—Removal And Remand—Vendo Precludes Litigation Of All Issues In One Forum .....	15
B. The First State Court Trial And Appeal—The False Trade Secret Theory—Echoes Of Vendo v. O. C. Long .....	17
(1) The Trial Judge Enters Judgments For Theft Of Trade Secrets And Breach Of The Covenants .....	17
(2) The Appellate Court Reverses Both Judgments .....	18
(3) Another False Trade Secret Claim—Vendo v. O. C. Long .....	19
C. The Second Trial And Appeal—Vendo Ignores The Mandate And Claims That Stoner Was Responsible For Its Failure To Have A FIFO Machine .....	20
(1) Vendo Prepares For The Second Trial—The Facts It Found Out .....	20
(2) The Trial Court Denies Reinstatement Of The Illinois Antitrust Defenses And	

Counterclaim And Defendants Dismiss Their Federal Antitrust Defense .....	21
(3) Pierson Blames Stoner For Vendo's Failure To Have A FIFO Machine .....	22
(4) The Trial Court Enters Judgment .....	23
(5) The Appellate Court Reverses The \$7,345,500 Judgment .....	23
D. Refusing To Consider Any Restraint-Of-Trade Issues, The Illinois Supreme Court Reinstates The \$7,345,500 Judgments Based Upon A New Theory Of Liability—Diversification Of A Corporate Opportunity. The Very Basis Of The Judgments Is Bound Up With The Federal Antitrust Issues At Bar .....	24
(1) What The Illinois Supreme Court Decided .....	24
(2) The Foundation Of The State Court Judgments Is Bound Up With The Federal Antitrust Issues At Bar .....	26
III.	
Proceedings In The Courts Below .....	27
A. Proceedings In The District Court Pending The Outcome Of The State Case .....	27
B. The Motion For A Preliminary Injunction .....	28
(1) The District Court Directs The Parties To Prepare For Trial .....	28
(2) Vendo Commences Collection And Precipitates An Emergency .....	28
(3) Vendo's Voluntary "Standstill Agreement" .....	29
C. The District Court's Decision .....	31
(1) The Memorandum Opinion And Order ..	31
(2) The Injunction Order—A "Standstill Order" Supported By Elaborate Security Arrangements .....	32

D. The Court Of Appeals' Decision .....	33
E. Subsequent Proceedings In The District Court .....	34
SUMMARY OF ARGUMENT .....	35
ARGUMENT .....	42

## I.

The Scope Of Review Here, Aside From Jurisdiction, Is Limited To Determining Whether The District Court Violated Some Principle Of Equity Or Clearly Abused Its Discretion .....

42

- A. The District Court Found That Petitioner's Efforts To Collect The Balance Of Its Judgments Would Further A Violation Of The Federal Antitrust Laws .....
- B. The District Court Found That Immediate Collection By Petitioner Of The Balance Of Its State Court Judgments Would Thwart The Prosecution Of Federal Antitrust Claims .....

43

47

## II.

The District Court Had Jurisdiction To Enjoin Petitioner, Pendente Lite, From Collecting The Balance Of Its State Court Judgments. The First Two Exceptions To 28 U.S.C. §2283 Applied Here .....

50

- A. The Preliminary Injunction Was Expressly Authorized By §16 Of The Clayton Act, Within The Meaning Of 28 U.S.C. §2283 .....
- 1. Injunctive Relief Under §16 Of The Clayton Act Is A "Uniquely Federal Remedy," Entrusted By Congress To The Exclusive And Untrammelled Jurisdiction Of The Federal Courts .....
- 2. Both The Clear Terms And Legislative History Of §16 Show That Its "Intended Scope" Would Be "Frustrated" If Federal Courts Were Powerless To Issue An Injunction Where Antitrust Violations Are

50

52

52

Furthered By Collection Of State Court Judgments .....	55
3. The "Intended Scope" Of §16 Would Be Frustrated Were Petitioner Permitted To Consummate Its Antitrust Violations And Thwart Private Enforcement Of The Antitrust Laws .....	59
4. Affirmance Of This Preliminary Injunction Would Not Impair The Continuing Vitality Of §2283 .....	62
B. The Preliminary Injunction Was "Necessary In Aid Of" The District Court's Jurisdiction Within The Meaning Of The Second Exception To 28 U.S.C. §2283 .....	64
III.	
The Preliminary Injunction Strikes A Proper Balance Between State And Federal Interests And Thus Is Fully In Accord With Principles Of Comity And Federalism .....	68
A. Enjoining Collection Of Petitioner's Judgments, Pendente Lite, Did Not Unduly Infringe Any Significant State Interest .....	71
B. Paramount Federal Interests Required The Issuance Of The Preliminary Injunction .....	74
IV.	
The Injunction Is Not Precluded By Respondents' Failure To Press Their Federal Antitrust Defense In The State Court Action .....	76
V.	
The District Court Did Not Reverse, Review Or Revise The State Court Decision By Collateral Attack Or Otherwise .....	82
CONCLUSION .....	84
ADDITIONAL APPENDIX A—	
Text Of Additional Statutes Involved	

## LIST OF AUTHORITIES CITED

## Cases

Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1955) .....	61
American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 1966 Trade Cases ¶71,918 (S.D.N.Y.) .....	63
Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970) .....	39, 65, 66
Avon Pub. Co. v. American News Co., 143 F.Supp. 516 (S.D.N.Y. 1956) .....	63
Bascom Launder Corp. v. Telecoin Corp., 9 F.R.D. 677 (S.D.N.Y. 1950) .....	63
Bath Industries v. Blot, 427 F.2d 1027 (7th Cir. 1972) ..	42
Carter v. Ogden Corp., 524 F.2d 74 (5th Cir. 1975) .....	63
Celebrity v. Trina, Inc., 264 F.2d 956 (1st Cir. 1959) ....	43
Colorado River Water Conservation District v. United States, 47 L. Ed. 2d 483 (March 26, 1976) .....	71
Cousins v. Wigoda, 463 F.2d 603 (7th Cir.), motion for stay of execution denied, 409 U.S. 1201 (1972) (opinion in chambers) .....	72
England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964) .....	80
Ex Parte Simon, 209 U.S. 144 (1908) .....	56
Great Lakes Dredge & Dry Dock Co. v. Huffman, 319 U.S. 293 (1943) .....	72
Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1071 (8th Cir. 1971) .....	63
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) .....	69, 70, 71, 72, 74
In re Glenn W. Turner Enterprises Litigation, 521 F. 2d 775 (3d Cir. 1975) .....	67
Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir. 1968) .....	54
Jennings v. Boenning and Co., 482 F.2d 1128 (3d Cir. 1973) .....	66, 67
Katz Drug Co. v. Schaeffer Pen Co., 6 F.Supp. 212, 214 (W.D. Mo. 1933) .....	63-64

Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957) .....	60, 62
Lyons v. Westinghouse Electric Corp., 109 F.Supp. 925 (S.D.N.Y. 1952), <i>aff'd</i> , 201 F.2d 510 (2d Cir.), <i>cert. denied</i> , 345 U.S. 923 (1953) .....	61, 66
Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), <i>cert. denied</i> , 350 U.S. 825 (1955) .....	37, 41, 53, 54, 75, 79, 83
Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963) .....	54
Marshall v. Holmes, 141 U.S. 589 (1891) .....	56
Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944) .....	41, 81
Mitchum v. Foster, 407 U.S. 225 (1972) .....	31, 33, 37, 38, 50, 54, 55, 57, 59, 60
Okin v. S.E.C., 161 F.2d 978 (2d Cir. 1947) .....	59
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) .....	61, 68
Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 494, 514, 517-19 (E.D. Pa. 1972) .....	64
Porter v. Dicken, 328 U.S. 252 (1946) .....	54, 55, 58
Potter v. Carvel Stores of N.Y., Inc., 314 F.2d 45 (4th Cir. 1963) .....	63
Prendergast v. New York Tel. Co., 262 U.S. 43 (1923) ..	42
Red Rock Cola Co. v. Red Rock Bottlers, 195 F.2d 406 (5th Cir. 1952) .....	61, 69
Reines Distributors, Inc. v. Admiral Corp., 182 F.Supp. 226 (S.D.N.Y. 1960) .....	63
Response of Carolina v. Leasco Response, Inc., 498 F. 2d 314 (5th Cir.), <i>cert. denied</i> , 419 U.S. 1050 (1974) ..	69
Rizzo v. Goode, 423 U.S. 362 (1976) .....	72
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) .....	82
Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) .....	42
Schine Chain Theatres v. United States, 334 U.S. 110, 119 (1948) .....	83
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) .....	41, 54, 76, 82
Sovereign Camp v. O'Neill, 266 U.S. 292 (1924) .....	56

Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966) .....	38, 59, 60, 61, 62, 67
Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941) .....	56
United States v. Bayer, 135 F.Supp. 65 (S.D.N.Y. 1955) .....	64
United States v. Corrick, 298 U.S. 435 (1936) .....	42
Vernitron Corp. v. Benjamin, 440 F.2d 105 (2d Cir.), cert. denied, 402 U.S. 987 (1971) .....	66, 67
Walling v. Black Diamond Coal Mining Co., 59 F.Supp. 348 (W.D. Ky. 1943) .....	59
Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920) .....	56
Younger v. Harris, 401 U.S. 37 (1971) .....	69, 70, 71, 72, 74
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) .....	38, 57, 58, 61, 68

#### Statutes

United States Constitution, Article III .....	32, 38, 65
Anti-Injunction Statute, 28 U.S.C. § 2283 .....	
..... 2, 31-33, 37-39, 44, 50-52, 54-56, 58-60, 62-64, 72-73	
Clayton Act, §§ 4, 16, 15 U.S.C. §§ 15, 26 .....	
..... 1-2, 37-39, 50-52, 55-57, 61, 63-64, 69	
Sherman Antitrust Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 .....	
..... 1, 3-4, 31, 35-36, 40-41, 45-47, 52, 55, 64, 72, 82-84	
Emergency Price Control Act of 1942, § 205(a), 56 Stat. 33 .....	54, 58, 59
Illinois Antitrust Act, Ill. Rev. Stats., ch. 38, §§ 60-1 to 60-11 .....	16, 17, 19, 21, 25, 72, 77-78

#### Other Authorities

51 Cong. Rec. 9261-62, 9270, 15944, 16275, 16319 (1914) ..	57
"Historical and Practice Notes—1970," Smith-Hurd Ill. Annot. Stats., Ch. 38, § 60-7.9, p. 882 .....	21
H.R. Rep. No. 627, p. 17, 63rd Cong., 2d Sess. (1914) ..	57
Moore, Federal Practice (2d ed. 1974) .....	16, 76
Note, The Federal Antitrust Laws and the Anti-Injunction Statute: Conflict and Coexistence, 42 Geo. Wash. L. Rev. 115 (1973) .....	57
S.Rep. No. 698, 63rd Cong., 2d Sess. (1914) .....	57

#### ABBREVIATIONS AND RECORD REFERENCES

"Stoner" refers to respondent Harry B. Stoner.

"Stoner Inv." refers to respondent Stoner Investments, Inc.

"Lektro-Vend" refers to respondent Lektro-Vend Corp.

"Vendo" refers to petitioner The Vendo Company.

"App." refers to the appendix.

"Pet. Br." refers to petitioner's brief on the merits.

"Tr. ...." refers to the five volume transcript of the hearing upon respondents' motion for preliminary injunction, held before the District Court from February 10, 1975, through February 14, 1975.

"Tr.," followed by a specific date and page reference, refers to other transcripts of proceedings before the District Court which are included in the record.

"PX" and "DX" refer, respectfully, to respondents' and petitioner's exhibits admitted during the five day hearing upon respondent's motion for preliminary injunction in February, 1975. Respondents' exhibits included "PX 301" through "PX 367," and petitioner's exhibits included "DX 401" through "DX 423."

Exhibits admitted in either of the two state court trials are referred to by their exhibit number ("PX ...." or "DX ...."). They are to be found in the two books of exhibits which were admitted during the preliminary injunction hearing in District Court as PX 301 (Vol. I, comprising PX 1A - PX 79 and DX 1 - DX 33) and PX 302 (Vol. II, comprising PX 101 - PX 135 and DX 201 - DX 304).

Other material from the state court proceedings, which is not reproduced in the District Court hearing transcript, is cited to the two volumes of the state court abstract, which were admitted in the trial Court as PX 303 (first state court trial, pp. 1-625) and PX 304 (second state court trial, pp. 627-1225).

"Item ...." refers to court papers in the record of the District Court proceedings which are not reproduced in the Appendix. The item numbers are indicated by the District Court Clerk in the list of docket entries and are recorded on the documents themselves.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

---

**No. 76-156**

---

**THE VENDO COMPANY**, a Missouri corporation,  
*Petitioner,*

vs.

**LEKTRO-VEND CORP.**, a Delaware corporation,  
**HARRY B. STONER** and  
**STONER INVESTMENTS, INC.**, a Delaware corporation,  
*Respondents.*

---

On Writ Of Certiorari To The United States Court  
Of Appeals For The Seventh Circuit

---

**RESPONDENTS' BRIEF**

---

*May It Please The Court:*

**Additional Statutes Involved**

---

Petitioner omits (Pet. Br. 2-3) Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1, 2) and Section 4 of the Clayton Act (15 U.S.C. §15) which are set out in pertinent part in respondents' Additional Appendix A, *infra*.

---

NOTE: For key to record references and abbreviations, see p. ix, *supra*. Emphasis supplied throughout unless otherwise noted.

### Questions Presented

---

1—Whether upon an interlocutory appeal from the award of a preliminary injunction the findings of fact and conclusions of law of the District Court may not be set aside unless contrary to settled principles of jurisdiction or rules of equity, absent a clear abuse of discretion.

2—Whether Section 16 of the Clayton Act “expressly authorizes” a preliminary injunction against the collection of state court judgments, within the meaning of the Anti-Injunction Statute, 28 U.S.C. §2283, where the District Court found that those judgments depended on agreements violative of the Sherman Act, that their procurement was part of an anticompetitive scheme, and that the immediate collection of the balance of those judgments would thwart the trial of federal antitrust treble damage claims.

3—Whether the award of a preliminary injunction against the collection of state court judgments is “necessary in the aid of [the] jurisdiction” of a United States District Court, within the meaning of the Anti-Injunction Statute, 28 U.S.C. §2283, where the District Court found that those judgments depended on agreements violative of the Sherman Act and were part of an anticompetitive scheme, and where the immediate collection of said judgments would eliminate two federal antitrust plaintiffs and cripple the third plaintiff’s prosecution of the sole remaining federal antitrust claim.

4—Whether the preliminary injunction at bar offends principles of comity and federalism where, absent equitable relief, the trial of federal antitrust claims would be

thwarted, and where the conduct enjoined—immediate enforcement of state court judgments—would further a violation of the federal antitrust laws.

5—Whether respondents Stoner and Stoner Inv. waived their right to obtain the preliminary injunction at bar by dismissing, without prejudice and without objection, a federal antitrust defense previously asserted in the state court proceedings, considering the peculiar facts of this case and respondents’ role as private attorneys general enforcing the federal antitrust laws in the public interest.

6—Whether the District Court asserted jurisdiction to reverse, review or revise the decision of the Illinois Supreme Court by collateral attack or otherwise.

### STATEMENT OF THE CASE

---

Petitioner’s statement of this case sidesteps the very heart of the matter. The Courts below found petitioner *prima facie* guilty of sweeping violations of Sections 1 and 2 of the Sherman Act; that the state proceeding—both from its inception and upon its culmination—was founded on illegal agreements; and that the proceeding itself was not “a genuine attempt to use the adjudicative process legitimately,” but rather was part and parcel of a monopolistic scheme. Absent the preliminary injunction at bar, petitioner would have fully reaped the fruits of its anticompetitive devices. It would also have thwarted, not merely respondents’ private interests, but more importantly, the

overriding national policy of the antitrust law, whose enforcement in this case is entrusted to private attorneys general in a federal court possessed of an exclusive jurisdiction. Distilled, petitioner's brief amounts to no more than this: 1—that it is entitled to obtain the fruits of an illegal objective, in violation of ancient law that if the objective is illegal, it cannot be accomplished by any means, and 2—that no court of the United States has any power to prevent the successful consummation of its illegal enterprise, the federal antitrust laws notwithstanding.

Petitioner's brief contains assumptions contrary to the record, and cursory and inaccurate statements about the "marathon state court proceeding" (Pet. Br. 5) which resulted from two entirely false claims being asserted by it in two separate court trials, as part and parcel of an attempt to enforce agreements and covenants violative of Sections 1 and 2 of the Sherman Act. This "classic example," as the Court of Appeals described the case (App. 286), cannot be understood within the frame of petitioner's Statement (Pet. Br. 3-16), with its carefully selected compartments which emphasize the Opinion of the Illinois Supreme Court, while ignoring the evidence below including, *inter alia*, the character, size and monopolistic practices of Vendo, including the contracts in question, not to mention the two findings of the Illinois Appellate Court that Vendo's claims were utterly bereft of evidence to support them. This "classic example" derives meaning and understanding only in the totality of its facts, and these we feel compelled to state.

# I.

## VENDO EMPLOYED STONER AND ACQUIRED HIS COMPANY (STONER MFG. CO.) AS PART OF AN ANTICOMPETITIVE SCHEME.

### A. Vendo's Preeminence In The Industry—Its Acquisitive Aims And Actions.

Vendo\* is the world's largest manufacturer of automated merchandising equipment (Tr. 797). By June, 1959, it manufactured and sold more vending machines than any other company. It touted the "universality" of its markets, which encompassed the "whole world over" (PX 303, pp. 20-28; 36-37; Tr. 153-54; see PX 354). Its corps of 112 salesmen sold in every state and it exported machines to fifty-eight countries throughout five continents (*Id.*; PX 8, p. 2).

Vendo intended to expand throughout the world wherever coins were in use (PX 303, p. 472). Prior to 1959, it had an "aggressive acquisition program" to buttress its product line and market share (D. Ct., App. 236; \*\* Tr. 795-96, 848). Among other firms, it acquired Coin Acceptors, Inc., Continental Vending Machine Corp. and Continental APCO, Inc., closing down the latter's plants and ceasing production of its machines (App. 133-34; Item 104, ¶¶ 11, 19). Vendo's acquisition of the Vendorlator Company, a manufacturer of bottle vending machines, provoked a Federal Trade Commission ("FTC") proceeding. This culminated in a consent decree which required FTC clearance for certain future acquisitions (Tr. 799, 833).

\* In setting forth the pertinent evidence below, this Statement refers to petitioner, The Vendo Company, as "Vendo."

\*\* Pertinent findings of the District Court are indicated as follows: "D.Ct., App. ...." For the key to other record references and abbreviations, see p. ix, *supra*.

**B. Vendo's 1959 Acquisition Of Stoner Manufacturing And Its Employment Of Stoner.**

Vendo's acquisition of Stoner Manufacturing Co. ("Stoner Mfg.") was the genesis of this dispute (D.Ct., App. 228). As early as 1955, Vendo's executive vice-president Wagstaff told Stoner that "they were going to acquire [Stoner Mfg.] or else they were going to manufacture a copy of [the Stoner Mfg.] machine and put it on the market so cheap they would put us out of business" (Tr. 528). After the death of a close associate and his own illness, Stoner decided to sell (Tr. 529; PX 303, p. 175; PX 2). Negotiations commenced in earnest in October, 1958 (Tr. 203; PX 303, p. 453).

(1) *The Acquisition Was Expressly Spurred By Vendo's Intent To Suppress Competition*—Vendo wanted to acquire Stoner Mfg. not only to expand its product line but also to eliminate Stoner as a potential competitor in the vending machine market (D. Ct., App. 228). During the negotiations a "confidential" memorandum was circulated within Vendo. It cited a "consensus of opinion" within the Marketing Division that Vendo's expansion would be "definitely retard[ed] with a competitor such as Stoner already in the field" (PX 319, ¶ 5). Moreover, Vendo had already made a "definite decision" to develop its own new product line similar to Stoner's (*Id.*, ¶¶ 1, 3). It feared this would prove "very unprofitable" if Stoner Mfg. were acquired by some other "more aggressive competitor with an easement of [Stoner Mfg.'s] credit policies" (*Id.*, ¶ 6).

Wagstaff, Vendo's chief negotiator, reported to Vendo's chairman Pierson that at least two other competitors were "actively negotiating" with Stoner and that, unless Vendo acquired Stoner Mfg., it would be more difficult for Vendo

to become a "full line" manufacturer, which it was "trying hard to do" (DX 1, p. 5; Tr. 255).

(2) *Vendo Secured FTC Approval By An Apparent Misrepresentation Of Competitive Facts*—In view of the Vendorlator consent decree (*supra*, p. 5), Vendo sought FTC clearance for the Stoner Mfg. acquisition (Tr. 833). Apparently Vendo accomplished this by misrepresenting to the Commission that Stoner Mfg. and Vendo were not actual or potential competitors. The record demonstrates that at the least Vendo was a potential competitor of Stoner Mfg. (D. Ct., App. 228 n. 3).

Thus when Vendo supplied to its counsel data for the FTC, that data differed markedly from the content of its internal memoranda. Vendo emphasized to its FTC counsel that the Stoner Mfg. products were substantially different from its own products and were not used for similar purposes (PX 313). But Vendo did *not* disclose that it had already made a "definite decision" to produce Stoner-type products and was, in fact, already developing them (PX 319, ¶¶ 1, 3; Tr. 68-69, 851-52). Vendo decided against further development of its own new products because "it would take a considerable sum of money [and] a considerable amount of time" (PX 319, ¶ 2). Instead it decided to take over Stoner Mfg., which already had acceptable machines on the market (*Id.*, ¶ 3, Tr. 70).

(3) *Vendo Insisted Upon Elaborate Restraints Upon Competition—The Termination Provisions*—"[S]pearheaded" by chairman Pierson (Tr. 260, 262), Vendo militantly pursued a "uniform policy of extracting broad covenants not to compete" (D. Ct., App. 236) "[w]herever it [could] get them" and "in anything it [could] get them into" (Wagstaff, Tr. 260; Pierson, Tr. 88). Thus its negotiators ag-

gressively demanded elaborate restraints against competition on the part of Stoner and his company. Initially, Vendo required that Stoner Mfg. (to be renamed "Stoner Investments") not compete for five years following the acquisition (DX 5). But Vendo then insisted that "[t]he period should be ten years," and that "Mr. Stoner individually should enter into a similar covenant not to compete" (DX 6, p. 5). Thus a ten year non-competitive covenant was written into the final acquisition agreement, executed April 3, 1959, as section 15 thereof (App. 153).

By a separate employment agreement, dated June 1, 1959, *Stoner was bound* "to serve as an officer or in such other executive or advisory capacity" as Vendo "*may request* and as Stoner's physical condition will permit . . . and to serve without additional compensation . . . as a director." It was recited that the value of Stoner's services (\$50,000 per year) was not measured by the amount of time and effort he devoted but *by the value of his advice and counsel* in the operation of the plant and his know-how, experience and reputation (App. 155, ¶¶ 1-3).

The covenant not to compete applied, *not* to where *Stoner Mfg.* did business, but "in any of the territories in which [Vendo] or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities" (App. 156, ¶ 5). The patent overbreadth of these covenants was not inadvertent. Anent their design, Wagstaff testified that any lawyer who "wouldn't put something like that in there . . . wouldn't represent us very long" (Tr. 239). Thus the Vendorlator acquisition contract likewise barred Vendorlator, the seller, from competing anywhere the purchaser, Vendo, did business (PX 353, ¶ 19).

Stoner's employment could be *terminated* in several ways: (a) Vendo "shall have the right to terminate . . . in the event of [a] *substantial violation of the terms* hereof by Stoner"; (b) Stoner could only terminate "in the event he is not physically able to perform his duties hereunder." If not terminated by either party, the employment would expire at the end of the five year term or on Stoner's death, whichever came first (App. 156-57, ¶¶ 6-8).

If the employment were terminated before completion of the five year term, Vendo would have to pay compensation to Stoner only to the time of the termination (*Id.*, ¶¶ 6, 9) and *the second five year period*, relating to the covenant not to compete, *would immediately commence running at the time of the termination* (*Id.*, ¶¶ 5, 6).

(4) *The Covenants Not To Compete Were Admittedly A Major Goal Of The 1959 Transaction*—The District Court found not *only* that the covenants were "overly broad" (Pet. Br. 14) but also that "their object (and effect) were *primarily* directed at the elimination of competition rather than protection of good will" and that "Vendo's president admitted the major purpose and intent of the employment contract was to obtain the anticompetitive benefits accruing from the covenants" (D. Ct., App. 233-34).

Indeed, Vendo's highest officials repeatedly testified to the purpose and intent underlying the covenants. Wagstaff swore that Stoner "wasn't to compete *anywhere*, in the whole world, *anywhere*, he wasn't to compete;" that Stoner "wasn't to compete, *ever*;" that "[t]here's no question in my mind that [Stoner] understood that he wasn't to compete with us" (Tr. 245-46); and that tying up Stoner so that he couldn't compete "certainly would have been [chairman Pierson's] understanding" (Tr. 260).

Pierson wrote to Stoner in January, 1963, that "one of the major advantages of the Stoner acquisition contract, from our standpoint, was the fact that it guaranteed that your design genius and experience would *never* be coupled with our money to put a new and most formidable competitor into the business against Vendo" (PX 28). Vendo's vice-president (Childers) testified: "We certainly wanted to be sure in making this acquisition that [Stoner] would be on our side of the fence and not a competitor" (Tr. 774).

(5) *Vendo's Employment Of Stoner Was Itself But An Anticompetitive Device*—Mr. Stoner had been led to believe he would be able to take an active role in research and development and would be treated as Chairman of the Board with respect to the purchased assets of Stoner Mfg. (D. Ct., App. 229; Tr. 72, 85, 299; PX 370; see Tr. 870). But "in actuality, Mr. Stoner was virtually ignored or bypassed by the Vendo management" (D. Ct., App. 229), was apparently "never called upon to perform significant services for Vendo" (*Id.* 234) and "was given no duties" (*Id.* 237).

Having relegated Stoner to the role of "senior citizen," "father confessor" and "advisor" (Tr. 293-95; PX 5; Tr. 535-36, 777, Tr. 772, 776, 875; PX 303, 172), Vendo's officials then never sought his advice and, when it was offered, spurned it. While acknowledging Stoner's "design genius" in creating innovative vending machine products (D. Ct., App. 228; see PX 28), Vendo never assigned him to its products planning committee (Tr. 778) nor called upon him for any exercise of his "genius" (Tr. 861; PX 30). Pierson conceded that neither he nor anyone else at Vendo *ever* asked Stoner to assist in the design of any device (Tr. 117).

Vendo management admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services (D. Ct., App. 229). Since "Stoner was never called upon to perform significant services for Vendo the covenant amounted to a naked agreement not to compete, solely anticompetitive in purpose and effect" (*Id.* 234).

Indeed, Vendo equated Stoner's employment with non-competition. Chairman Pierson testified that the employment contract was "necessary for us to have if we were going to spend as many millions of dollars for the property as we were" (Tr. 86); that "we certainly ought to have an [em]ployment that he would agree to stay out of competition for five years" (*Id.*); and that Vendo was "paying [Stoner] \$50,000 a year" in return for his obligation not to compete (Tr. 99). Wagstaff also acknowledged that Stoner's employment contract and his non-competition covenant "go hand in hand;" that he didn't propose that Stoner would perform "any specific duties;" and that getting a covenant from Stoner was "[o]ne of the main justifications for" Stoner's employment contract (Tr. 253-54).

### C. Vendo's Refusal To Release Stoner And Its Failure To Terminate His Employment.

(1) *Vendo Refused Stoner's Request To Join The Lektro-Vend Venture*—In 1960 Stoner ("virtually ignored or bypassed by the Vendo management" (D. Ct., App. 229)) began making loans for vending machine research and development by Rod and Bill Phillips, former employees of Stoner Mfg. The Phillipses' work culminated in the development of a revolutionary design (first in/first out or "FIFO") which was called "the Lektro-Vend machine" (D. Ct. App. 229; App. 53-55, 57).

After the favorable reception of their machine at a trade show in October, 1962, the Phillipses determined not to sell the design, as initially planned, but to produce and sell machines. When they invited Stoner to join in this new project, he sought a release from his contract before a Vendo board meeting in December, 1962. Vendo refused the request because the 1959 acquisition agreement "guaranteed" that it would "never" have to compete with Stoner (D.Ct., App. 229; PX 28, *supra*, p. 10).

(2) *Well Knowing Of Stoner's Aid To Lektro-Vend, Vendo Does Not Terminate Him, For Anticompetitive Reasons*—Vendo was well aware of Stoner's involvement with the Lektro-Vend inventors as early as the 1962 trade show when Vendo employees were present and made initial inquiries about purchasing the Phillipses' new design (D. Ct., App. 229, 230; Tr. 867-68; see PX 352, handwritten note).

Wagstaff testified that there was "outrage" within Vendo officialdom "about the whole Lektro-Vend set-up" at that time (Tr. 279) and that other executives told him "that [Stoner] was financing Lektro-Vend to go into competition with Vendo" (Tr. 280). Pierson, who disclaimed any "official" knowledge, admitted having heard "many rumors" from employees and customers that Stoner "was bringing out the superlative in fine candy vending equipment" (Tr. 143-44). But Pierson never checked or pursued these rumors (*Id.*; see also Tr. 105; Tr. 773, 775-76).

Vendo never terminated Stoner's employment despite its contractual right to do so "in the event of a substantial violation of the terms" by Stoner (*supra*, p. 9), and thereby "lengthen[ed] the period for which its non-competition covenants would run" (D. Ct., App. 237).

#### D. Vendo "Negotiates" For The Purchase Of The Lektro-Vend Machine.

(1) *Pierson Requests Stoner To Intercede*—In December, 1962, after he was refused permission to join Lektro-Vend, Stoner told Pierson that "maybe this [machine] is something that the Vendo Company should have" (Pierson, Tr. 104; see PX 27). Pierson then told Stoner to see if Phillips was interested in selling and, if so, that Vendo would "assign someone with the authority to negotiate such a deal to work with you and Mr. Phillips" (PX's 29, 30).

(2) *Vendo's Experts Disdain The Purchase*—Vendo proceeded to "find out just how serious" it was about the purchase (PX 33). In early 1963 within "three or four days . . . two separate groups of people" travelled from Kansas City to Aurora to reevaluate the new machine (Tr. 775, 778). The engineers reported serious technical problems (DX's 11, 11A, 12; Tr. 855) and that it was "too costly and could not be sold competitively" (Tr. 856; DX 13). Vendo's marketing chief also "didn't think" Vendo should buy since Lektro-Vend "took the high-cost route . . . which in my mind is not economically a good route to go" (Tr. 785-86).

(3) *Stoner Warns Vendo Of "A Serious Mistake"*—On March 28, 1963, Stoner wrote to Vendo headquarters that Phillips, who had heard nothing further, "could be relinquished of his promise to give Vendo first chance for acquiring" his machine. Stoner added: "*I think that the future will show that this represents a serious mistake on your part*" (PX 32).

Childers responded that the asking price (\$1.5 million) was too high but that Vendo would offer to "pay for all

out-of-pocket costs . . . plus a fair profit to Rod and his associates" (PX 31). Stoner then called Childers and asked "if he had a specific figure in mind that he wanted me to talk to Rod Phillips about" (PX 304, pp. 1149, 1152) but Childers "said no. He said, 'We just can't see any market for it. It's too expensive a machine'" (*Id.*, p. 1152). Stoner also called Vendo's senior vice-president, who testified that he "told [Stoner] that I had checked with our people who were concerned, and they had said no, they were not interested" (Tr. 789; see also Tr. 788-91).

(4) *Chairman Pierson Personally Inspects—And Rejects—The Lektro-Vend Machine*—According to Pierson, Childers reported "that he didn't think it would be advisable" to continue negotiations (Tr. 127). Pierson also paid a personal visit to Aurora in May, 1963 when "someone said . . . that Mr. Stoner, you know, has been wanting me to see this Rod Phillips vending machine. So I went over there" (Tr. 156-57). Pierson told the Phillipses that their machine "looked pretty" (*Id.*); that "it should render a great service to the industry;" and that "if one can be perfected, why, at a reasonable price, I think it will do fine business" (Tr. 161-62).

Pierson also testified that Vendo did not purchase the Lektro-Vend because "the group decided" that its selling price would be too high. "I was told that they came to that conclusion" (*Id.*). Pierson never informed Stoner what "the group" decided nor that he had met with the Phillipses. Stoner later wrote Pierson that he "would have liked to [have] had a chat with you while you were here . . . if I had known you were coming." He added: "Please advise if you would like me to do anything further regarding your visit with Rod Phillips" (PX 311). But Pierson never responded (Tr. 596).

## II.

### **VENDO SUED TO ENFORCE ITS COVENANTS, PRESSED CLAIMS IT KNEW TO BE FALSE, AND SECURED JUDGMENTS WHICH WERE INERADICABLY TAINTED BY THE UNDERLYING ANTICOMPETITIVE AGREEMENTS.**

On March 25, 1965, when no longer employed by Vendo,\* Stoner wrote his "Dear Operator" letter, announcing to the trade his affiliation with Lektro-Vend Corp. and seeking to allay rumors (reportedly circulated by Vendo salesmen) that the new company would soon founder (D. Ct., App. 230; PX 39). Deciding that Stoner had now gone "[t]oo far" (see PX 38, handwritten note), Vendo filed its state court suit against Stoner and Stoner Inv. in August, 1965. The District Court stated:

"The Court proposes to examine these proceedings *only* insofar as they may reflect illegal anti-competitive conduct by Vendo" (App. 230); and

". . . the state proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme" (App. 232).

#### **A. The Complaint—Removal And Remand—Vendo Precludes Litigation Of All Issues In One Forum.**

Vendo initially charged only a breach of the covenants not to compete in the employment and acquisition contracts, by reason of aid to Lektro-Vend Corp. "in competition with the plaintiff" (App. 6-10). Vendo sought \$500,000 in damages and an injunction against Stoner for the duration of his covenant, barring him "from engaging in the vend-

\* Stoner ceased being a Vendo director in March, 1964 (Tr. 143, 840). His employment expired on June 1, 1964.

ing machine . . . business . . . and *particularly* from participating in the operations of Lektro-Vend" until June, 1969 (App. 9).\*

Stoner and Stoner Inv. promptly removed the case to federal District Court (App. 11-14) "in an effort to avoid needless duplication of lawsuits between the parties" (App. 13). When Vendo refused to waive its objections to removal, the case was remanded to the Illinois trial court (App. 12), thereby precluding the adjudication of all claims and defenses raised by the parties—both state and federal—in the only tribunal capable of adjudicating all those claims and defenses.\*\*

After the case was remanded, Stoner and Stoner Inv. filed in state court substantially the same answer, defenses and state antitrust counterclaim which had been filed in federal court upon removal, including their sixth separate defense based upon the federal antitrust laws (App. 31-32), a defense under the Illinois Antitrust Statute of 1891 and a defense and counterclaim under the 1965 Illinois Antitrust Act (PX 303, pp. 12-13, 15-19, 39-41).

Since no federal antitrust counterclaim could be pleaded in the state court, on October 21, 1965—less than a month after remandment—Stoner and Stoner Inv., together with Lektro-Vend, filed this treble damage action in federal District Court.

Before trial commenced in the state court, the trial judge dismissed *all* antitrust defenses and the counter-

\* By a subsequent amendment Vendo sought similar injunctive relief against Stoner Investments (App. 35).

\*\* See 1A Moore's Federal Practice, ¶0.157[11], note 129 and accompanying text.

claim. He reasoned that state courts lacked jurisdiction to pass upon federal antitrust defenses (PX 303, pp. 97-100) and that, *inter alia*, federal preemption barred litigation of the state antitrust defenses and counterclaim owing to the interstate character of the parties businesses (*Id.* pp. 96-97)

# **B. The First State Court Trial And Appeal—The False Trade Secret Theory—Echoes Of Vendo v. O. C. Long.**

(1) *The Trial Judge Enters Judgments For Theft Of Trade Secrets And Breach Of The Covenants*—In January, 1966, Vendo added a charge that its trade secrets (vending machine designs) had been misappropriated for Lektro-Vend's benefit, and raised the ad damnum to \$1,500,000 (App. 33, 231). Upon trial, judgments were entered against Stoner for \$250,000 for breach of the covenants and against both defendants for \$1,100,000 for theft of trade secrets (App. 47).

Contrary to petitioner's assertions (Pet. Br. 10, *Id.* n. 7), no issue concerning "Stoner's violation of his fiduciary duties as an officer and director" was before the court since Stoner's claimed breach of the covenants and theft of trade secrets were the only theories pleaded (App. 6-10, 33-35). Although the trial judge spoke of Stoner's "obligations as a director" (Pet. Br. 10; PX 303, p. 485; App. 42) neither Count I nor Count II of Vendo's original or amended complaint charged either defendant with any violation of fiduciary duty (App. 6-10, 33-34).

Nor was Vendo's trade secret theory an "alternative ground" for both of these judgments. (Pet. Br. 10, n. 7). The \$250,000 represented forfeiture of salary for breach of the covenants, and the \$1,100,000 was for theft of a trade secret, representing the stated value of the Lektro-

Vend machine (\$1.5 million, *supra*, pp. 13-14), less the costs incurred in its development (App. 71).

(2) *The Appellate Court Reverses Both Judgments*—The Appellate Court reversed the \$1,100,000 judgment based upon the theft of trade secret theory, holding that Vendo never had a trade secret, let alone that Stoner had stolen one (App. 61-64). While petitioner's brief acknowledges that "the issue was not pursued thereafter" (Pet. Br. 10, n. 7) it ignores the District Court's finding below:

"It is clear from all the evidence that Vendo should have known that there was no theft of a trade secret; indeed, the first Illinois Court of Appeals decision demonstrates that the effort of Vendo to prove theft of a trade secret amounted to vexatious litigation" (App. 231).

Indeed, the Appellate Court said, *inter alia*, that Stoner's exposure to Vendo's alleged trade secret amounted to mere "glimpses and glances . . . [which] cannot seriously be contended . . . [to] be the foundation for the development of a revolutionary design that would take several skilled people eighteen months to develop" (App. 63).

The \$250,000 judgment was also reversed, the Appellate Court holding that Stoner's salary should be forfeited only for the period when he was in breach of his covenant (App. 71-73).<sup>\*</sup> The covenants not to compete were held

<sup>\*</sup> In one sentence the Court said that "such a breach of Stoner's fiduciary undertaking as an employee . . . requires a forfeiture of salary during the period that the breach was occurring" (App. 71), but this obviously refers to "breach of the covenants not to compete," as set forth in the immediately preceding sentence. The rest of the opinion deals solely with the validity of the covenants (App. 64-69), the time period during which they were valid (App.

(footnote continued on following page)

valid under Illinois common law and Stoner and Stoner Inv. were held liable for breach thereof (App. 64-70).

Dismissal of the state antitrust defenses and counterclaim was affirmed upon federal preemption grounds (App. 79-81), although dismissal of the federal antitrust defense was reversed (App. 77-79). The case was remanded for a second trial upon the question of what damages Vendo had suffered by reason of defendants' wrongful competition through the instrumentality of Lektro-Vend, in violation of the covenants not to compete (App. 74). Vendo's petition for leave to appeal to the Illinois Supreme Court was denied.

(3) *Another False Trade Secret Claim—Vendo v. O. C. Long*—In 1957, Vendo filed a similar action in Georgia against a former employee, Orlando C. Long, then employed by a competitor. The Georgia trial court held that the covenant not to compete was overbroad and local counsel recommended "against taking the matter further on appeal" (PX 344). Vendo's general counsel (Carbaugh) reported that "since . . . this lawsuit O. C. Long has calmed down a great deal of his annoying activities"; suggested interjection of trade secret allegations, though such relief would have "very little practical value" (*Id.*); and reported that despite dim "prospects on appeal . . . our Executive Committee has decided that it would be to the Company's advantage for many reasons to keep this case

68-69), whether "defendants' activities amounted to the direct or indirect entering into or engaging in the vending machine business" as proscribed by the covenants (App. 69-70), and the measure "of damages for a breach of the noncompetition covenants" (App. 73-75), namely, the damages caused by "defendants' wrongful competition" (App. 74).

pending for awhile" (PX 345). Vendo's minutes recited that an appeal would be taken in order "to delay the final resolution of this matter" (PX 346).

Carbaugh reported upon efforts to secure "further delay" and to assure that "the matter will take still more time" (PX's 347, 348, 350). Finally, he concluded: "If this action hampered O. C. Long's activities somewhat as a practical matter, and the Sales Department says that it has, I assume it has been worthwhile" (PX 348).\*

**C. The Second Trial And Appeal—Vendo Ignores The Mandate And Claims That Stoner Was Responsible For Its Failure To Have A FIFO Machine.**

(1) *Vendo Prepares For The Second Trial—The Facts It Found Out*—Vendo's general counsel Carbaugh addressed two inquiries to the sales and engineering staffs before the second trial. First, in order to estimate "sales . . . and profits we would have made if the Lektro-Vend machine had never been introduced," Carbaugh inquired "what is now and has been the impact of Lektro-Vend in the market?" (DX 218, p. 2). The answer was that Lektro-Vend's sales were comparatively miniscule—only two or three percent of industry sales (DX 203, p. 4). Another

---

\* Vendo's militancy embraced not only the exaction but the enforcement of its covenants not to compete (Pierson, Tr. 153; Wagstaff, Tr. 283). Apart from the *O. C. Long* and *Stoner* cases, Carbaugh's testimony was vague (Tr. 836-37). But the evidence reflected that Vendo similarly sought to enforce covenants against other former employees (PX 310, p. 8; Tr. 125-26), and Carbaugh did suggest that Vendo threatened a patent infringement suit against Vendorlator even though "patent counsel . . . felt, at least they said at that time they didn't think they were" infringing (Tr. 821).

FIFO manufacturer outsold it "8 or 10 to 1" through 1969 (PX 304, p. 821; see also *Id.*, pp. 784, 1029, 1043, Tr. 810). Through 1969, Lektro-Vend's *gross sales* were only about \$7 million.

Carbaugh addressed a second inquiry: "What is the present status as well as the past history of our development work on our own FIFO unit?" (DX 218). Carbaugh received Vendo's "very best thinking" (*Id.*) on this subject in a four page, single-spaced memo (DX 227) which detailed why Vendo rejected FIFO in 1959, 1962, 1963, 1964, 1965, 1966, 1968 and in 1969: (a) emphasis on "stop-gap adjustments" of non-FIFO products; b) insistence upon low cost and selling price; and (c) disagreement within management as to "just how much the FIFO feature was worth" (*Id.*, p. 4). Nowhere in DX 227 was Stoner even mentioned.

(2) *The Trial Court Denies Reinstatement Of The Illinois Antitrust Defense And Counterclaim And Defendants Dismiss Their Federal Antitrust Defense*—In 1969, after the first Appellate Court decision, the Illinois General Assembly—referring specifically to the *Vendo v. Stoner* case—amended the 1965 Illinois Antitrust Act, underscoring its intent that the statutory proscriptions applied equally to interstate, as well as purely intrastate, transactions (see "Historical and Practice Notes—1970," Smith Hurd Ill. Ann. Stats., Ch. 38, §60-7.9, p. 882). Based upon this amendment, Stoner and Stoner Inv. moved to reinstate their state antitrust defense and counterclaim. The trial judge, however, denied the motion.

Before the second trial, Stoner and Stoner Inv. moved to dismiss their federal antitrust defense *without prejudice*. There being no objection from Vendo, the motion

was allowed (App. 82). In an opinion denying summary judgment in the instant case, dated June 1, 1971, U.S. District Judge McGarr (before whom the case was then pending) said that dismissal of the federal antitrust defense "was undoubtedly done in consideration of this court's expressed reluctance to consider the cause of action here while the same issue was pending between the same parties in the state court case" (App. 85).

(3) *Pierson Blames Stoner For Vendo's Failure To Have A FIFO Machine*—Contrary to its own "best thinking" (DX 227) and the testimony of its officers Pierson (Tr. 102), Andrews (Tr. 855-56) and Burlington (Tr. 785-86), Vendo attempted at the second trial to implicate Stoner in its own decision against FIFO. Vendo's theory was that Stoner had deprived it of "his advice and counsel" (App. 155, ¶ 3) and thus was legally at fault for its failure to have a FIFO machine. This theory was entirely new (D. Ct., App. 231), and departed from the applicable measure of damages laid down by the Appellate Court, which general counsel Carbaugh had acknowledged to be the "business and profits [Vendo] lost due to Lektro-Vend's impact in the market" (DX 218, p. 2). Vendo now "had no interest in Lektro-Vend" (PX 304, p. 780; Tr. 809-10) and offered no evidence as to sales Lektro-Vend might have diverted from Vendo.

Vendo's new claim against Stoner was based upon Pierson's testimony at the second trial: "If we had known in 1963 that Mr. Stoner was doing this, [Vendo] would have moved full speed ahead to try [to] develop a FIFO unit at that time. The reason we didn't was that Mr. Stoner said 'I don't believe there is a market for such an expensive unit as would be necessary to be built at that time'" (Tr. 870-71). On cross, Pierson said that he "did not per-

sonally talk to Stoner about this" but had heard "this information about [Stoner's] advice from our people who were [at] a products planning meeting held at Aurora" and that this was "in the fall of 1960, I believe" (Tr. 871-72; see PX 304, pp. 930 et seq.). But none of the Vendo officers who attended that meeting testified that Stoner gave any such advice therein (PX 303, pp. 318, 421). The minutes of that meeting do not even reflect Stoner's attendance (PX 48, p. 1); they *do* reflect that Vendo's own staff opposed the FIFO project then under consideration (*Id.*, p. 3; see DX 11). This was, moreover, the very same meeting at which Vendo claimed in the first trial that Stoner was exposed to its "trade secret"—an exposure which the Appellate Court called mere "glimpses and glances," saying the charge "cannot seriously be contended" (App. 63).

(4) *The Trial Court Enters Judgment*—Judgments were entered against Stoner for \$170,835 (forfeiture of salary during the period he breached his covenant) and against both Stoner and Stoner Inv. for \$7,345,500 based on Vendo's new theory. The trial judge expressly stated that he was bound by "the Mandate of [the Appellate Court]" and "the law of this case" (App. 89), and said nothing about any breach of fiduciary duty by Stoner as a director or the misappropriation of any corporate opportunity. He specifically cited pages of the Appellate Court opinion which referred to "damages for a breach of the non-competition covenants . . . because of defendant's wrongful competition" through the instrumentality of Lektro-Vend (App. 89, 74).

(5) *The Appellate Court Reverses The \$7,345,500 Judgment*—Upon the second appeal, Stoner's salary forfeiture was affirmed but the \$7,345,500 judgment was reversed

because "Vendo made no attempt to prove lost profits caused by defendants' 'wrongful competition'" and thus disobeyed the Appellate Court's mandate (App. 96, 97). The Court also held that "[n]either the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO," referring in part to its first opinion (*Id.*).\* The case was remanded to give Vendo a third chance to prove the damage allegations of its original complaint (App. 99).

**D. Refusing To Consider Any Restraint-Of-Trade Issues, The Illinois Supreme Court Reinstates The \$7,345,500 Judgments Based Upon A New Theory Of Liability—Diversion Of A Corporate Opportunity. The Very Basis Of The Judgments Is Bound Up With The Federal Anti-trust Issues At Bar.**

Both sides were granted leave to appeal to the Illinois Supreme Court which affirmed the \$170,835 salary forfeiture and, reversing the Appellate Court, reinstated the \$7,345,500 judgments entered in the trial court.

(1) *What The Illinois Supreme Court Decided*—The Supreme Court predicated liability on a new and previously unadvanced theory of liability (D. Ct., App. 231). It held that Stoner, while an officer and director of Vendo, diverted a corporate opportunity—Vendo's opportunity to acquire the Lektro-Vend machine. It held that Stoner nurtured the Lektro-Vend machine, failed to disclose his financial involvement with Lektro-Vend and misled Vendo during its negotiations with the Phillipses. The Court *expressly refused to consider* the contention of Stoner and

\* Vendo also omits this finding in its Statement (Pet. Br. 11).

Stoner Inv. that the covenants not to compete, upon which Vendo sued, were unreasonable restraints of trade and thus unenforceable under Illinois common law (App. 111, 117).

The Court also affirmed the trial court's striking of the Illinois antitrust defenses and counterclaim upon the ground that the 1965 Illinois Antitrust Act could not be applied retroactively to contracts entered into in 1959 (App. 117-18), although the counterclaim alleged acts of Vendo which occurred *after the passage* of that Act, and which the Act made criminal (Ill. Rev. Stats., Ch. 38, §§60-1 to 60-11; PX 303, pp. 15-19, 39-40, ¶¶ 7-8, 9, 10).

Nor did the Court deny the defendants' contention that the new theory of damages which Vendo urged at the second trial—that Stoner was responsible for Vendo's not having FIFO—was contrary to the Appellate Court's mandate which fixed the law of the case for the parties and the trial court. Instead, the Supreme Court held that it was not bound by the law of the case (App. 114-15). It also rejected the contention that Vendo tried to prove a case it did not plead, stating that "the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff" (App. 115).

The damage award of \$7,345,500 was reinstated based on the Supreme Court's conclusions: (i) that it could not say that Vendo would have declined to purchase the Lektro-Vend machine or develop one of its own, had a genuine opportunity been extended to it (App. 114); (ii) that Vendo's damages should be measured by what it would have earned had it owned the Lektro-Vend machine (App. 118);

and (iii) that the amount of the judgment was within the range of the testimony of Vendo's experts (App. 121).

The Court did not mention Stoner's letter to Vendo that the future would show that Vendo's failure to purchase the Lektro-Vend was "a serious mistake on [its] part" (*supra*, p. 13). Concerning Childers' letter that Vendo would be willing to pay the Phillipses' costs plus "a fair profit" (*supra*, pp. 13-14), the Court stated that "[t]he record does not indicate whether this counteroffer was transmitted to Phillips" (App. 107). *But the record before it showed* (PX 304, pp. 1149, 1152) *that Stoner called Childers to ask if he had a specific figure in mind and Childers "said no. He said, 'We just can't see any market for it. It's too expensive a machine'"* (*supra*, p. 14). The record also showed that Vendo would not have bought the Lektro-Vend machine at any price. That *Vendo well knew that its theory was false* is demonstrated conclusively by additional evidence adduced before the District Court (*supra*, pp. 13-14, 19,23).

(2) *The Foundation Of The State Court Judgments Is Bound Up With The Federal Antitrust Issues At Bar*—Here we note petitioner's central assertion that, in the instant case, the District Court "neither found nor held that enforcement of the [state court] judgments would violate the antitrust laws" (Pet. Br. 14, 15, *Id.* n. 9). This is incorrect. The very foundation of those judgments was directly placed in issue by respondents' claims under both Sections 1 and 2 of the Sherman Act and necessarily depends upon the merit of those claims. The pertinent findings of the District Court are fully developed *infra*, pp. 43-47.

### III.

#### PROCEEDINGS IN THE COURTS BELOW.

##### A. Proceedings In The District Court Pending The Outcome Of The State Case.

Contrary to petitioner's assertions, respondents did not "reactivat[e] this federal action" (Pet. Br. 4) nor resort to a "new stratagem" (Pet. Br. 21) in asking the District Court for injunctive relief. That relief was only required to assure that there would be a trial upon respondents' federal antitrust treble damage claims. It was the understanding of the parties—including petitioner—that this case would proceed to trial when the state proceedings were determined. This is clearly borne out by the record of proceedings before the District Court (App. 260-64).

That record shows petitioner's acknowledgement that, apart from discovery, this case "was stayed pending the trial and completion of the State Court case" (Item 75, ¶ 2) until cross motions for summary judgment were filed, and denied (App. 83-88). It further shows that petitioner expressly represented that both sides were "waiting for our trial," that this procedure was "right" (Tr., Nov. 23, 1971, pp. 2-3), and that its counsel "appreciat[ed]" and "certainly fe[lt] . . . fair" the District Court's declared unwillingness "to get into a long difficult trial in this case when we don't know what impact the State case might have on the effect" (Tr., June 16, 1972, pp. 3-4, 5).

Thus when petitioner's counsel protested for the first time on June 19, 1975 (during oral argument concerning the form of the injunction order) that respondents should have sought to enjoin the state proceedings at their inception, Judge McLaren stated:

“... it was my understanding from your side as well as theirs that the cases were related in the state and here, but that it had been more or less agreed that the state case would go forward, and that when that was completed, we would try the case here” (App. 261).

## B. The Motion For A Preliminary Injunction.

(1) *The District Court Directs The Parties To Prepare For Trial*—The opinion of the Illinois Supreme Court was initially filed on September 27, 1974. On October 1, 1974, after discussion of the impact of that decision upon the issues in this case, respondents' counsel stated before the District Court that “we start afresh here.” Petitioner's counsel concurred: “Yes, we are fresh” (Tr., Oct. 1, 1974, p. 6).

After the Illinois Supreme Court denied rehearing on November 27, 1974, a pretrial conference was held on December 5, 1974, during which Judge McLaren directed the parties to prepare for trial of this action. New pleadings were to be filed, memoranda of further discovery exchanged, and a further pretrial conference (never held) was scheduled for March 3, 1975 (Item 91).

Accordingly, on January 2, 1975, respondents filed their amended and supplemental complaint (App. 124-59).

(2) *Vendo Commences Collection And Precipitates An Emergency*—Despite the fact that preparations were underway for trial of this case and certiorari had not yet been applied for or denied, petitioner commenced a host of citation proceedings in an attempt to collect its state court judgments forthwith (App. 178-207). On January 10, 1975, Stoner and Stoner Inv. were compelled to intervene in Vendo's proceeding against an escrow trustee, which culminated in Vendo's unlawfully premature collec-

tion of over \$582,000 (App. 186-87, ¶3, 149-50, ¶¶ 13, 14; Tr. 896-900).\*

Further collection, which was imminent, threatened a takeover of Lektro-Vend and Stoner Inv., and the consequent destruction of their federal antitrust claims. Those efforts also threatened to strip the remaining respondent, Stoner, of his assets. Thus, on January 23, 1975, respondents\*\* presented the District Court with a motion for preliminary injunction (App. 160-63, 177-207) seeking to stay any further collection activities pending a hearing.

Judge McLaren declined to issue a stay. Rather, he directed that Stoner and Stoner Inv. seek a stay of execution of the state court judgments from this Court, thus “exhaust[ing] all of the possibilities that are open to you in that other litigation” to avert the emergency. If unsuccessful, respondents were to receive “an immediate hearing on the preliminary injunction” (App. 170-72).

(3) *Vendo's Voluntary “Standstill Agreement”*—On January 27, 1975, Stoner and Stoner Inv. filed their petition for certiorari and motion for stay of execution in this Court.

On January 29, 1975, respondents returned to District Court, fearful of further imminent takeover orders. But

\* This escrow trust agreement barred “all proceedings” to enforce the judgments until the trustee verified that there had been a “complete and final determination” of the appeal (Ex. H to am. and suppl. compl., pp. 12, 13 (Item 92)). Since certiorari was to be applied for, the trustee formally declined to pay out. Nevertheless, petitioner continued to proceed against the trustee (Tr. 896-900) and to take further actions to enforce its judgments forthwith.

\*\* Petitioner's repeated complaint that Lektro-Vend was not formally a movant for injunctive relief (Pet. Br. 13, *Id.* n. 13, 14) is wholly specious. Lektro-Vend's interest was articulated and litigated not only during the injunction hearing (App. 227, n. 2; Tr. 27, 41, 43) but also on January 23, 1975, as counsel's remarks clearly show (App. 162-63).

petitioner's counsel then announced *a voluntary standstill agreement* pending the District Court's decision:

"... we are assuring your Honor on the record that we are voluntarily not planning to take any action out there that would in any way result in a turnover order and we intend to stay that out there until we hear from the United States Supreme Court and certainly we would intend to abide by any decision your Honor makes here" (App. 214).

The parties subsequently learned that Justice Rehnquist had denied the motion for stay of execution on January 28, 1975.

A hearing was held on the motion for injunctive relief from February 10, 1975 through February 14, 1975. On the final day of the hearing, petitioner's counsel specifically reaffirmed the standstill agreement, "assur[ing] the court here that *until your Honor has had an opportunity to make this decision*, we will continue all pending motions" in the state court collection proceedings (Tr. 876-77).\*

\* As part of the "standstill agreement," the District Court authorized Stoner and Stoner Inv. to pay counsel fees and expenses "in the ordinary course of business, whatever you normally do" (Tr. 879).

On April 16, 1975, concurrently with its post-trial brief, Vendo filed a motion to "clarify" the standstill agreement (Item 118), claiming for the first time that such payments of fees and expenses would contravene the state court citations (Tr., April 16, 1975, pp. 2-4). It also sought forthwith to institute "maybe twenty-five lawsuits" against third parties (*Id.*, pp. 5-6, 13), to levy upon certain Stoner Inv. real estate (*Id.*, p. 11) and to reactivate a contempt proceeding against Stoner and Stoner Inv. which had "been pending for about eight years" in the state court without action thereon (*Id.*, pp. 14-15).

The District Court directed that the parties "continue with the standstill agreement . . . in good faith," that Stoner and Stoner Inv. pay taxes on their properties and that they cease any further payment of fees or expenses until the motion was decided (*Id.*, pp. 22-23).

### C. The District Court's Decision.

(1) *The Memorandum Opinion And Order*—The District Court issued its memorandum opinion and order on May 29, 1975 (App. 226-42), awarding the preliminary injunction.

First, the Court dealt with the factors generally applied "to determine whether interlocutory relief is appropriate" (App. 232). It held that respondents "demonstrated likelihood of ultimate success on *both* the section 1 and section 2 Sherman Act claims" (App. 233), specifically noting the "*substantial*" (App. 236) and "*considerable* evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo" (App. 242). It further found "[o]n the record as a whole . . . that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo" (App. 238). It also stated:

"Few public policies are more important than protection of competition. In the instant case, as previously mentioned, the number of competitors in the vending machine market is declining. Thus the courts have a duty to vigilantly protect the remaining competition" (App. 239).

Then the Court separately addressed the "special burden" imposed on respondents because state court proceedings would have to be enjoined (App. 239). The Court held that it had jurisdiction to enjoin Vendo from further collection activities based upon the first two exceptions set forth in the Anti-Injunction Statute, 28 U.S.C. §2283. Applying the tests prescribed by *Mitchum v. Foster*, 407 U.S. 225 (1972), it held that Section 16 of the Clayton Act "expressly authorized" injunctions against "certain state actions, if necessary" (App. 240); that the federal anti-

trust “laws, in the instant case, can only be given their intended scope by staying the state court proceedings;” and “that §2283 authorizes an injunction here where the state court proceedings are part of the anticompetitive scheme” (App. 240-41).

The second (“in aid of jurisdiction”) exception provided in 28 U.S.C. §2283 was also held to apply since petitioner, unless restrained, would “as a matter of substance” control two of the three antitrust plaintiffs, requiring their dismissal under Article III (App. 241).

Further, the District Court recognized that “principles of comity and federalism militate against *unnecessarily interfering* with pending state court actions even if §2283 is satisfied” (App. 240), but it held that those principles “do not prevent the issuance of an injunction considering *the peculiar nature of this case*,” namely, that “[t]he federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention” (App. 241).

(2) *The Injunction Order—A “Standstill Order” Supported By Elaborate Security Arrangements*—The District Court’s injunction order issued on June 27, 1975 (App. 266-75). The Court intended “a standstill . . . order . . . under which the parties can go along in the normal course of business” (App. 264) *pendente lite*. Asserting that the order required “an injunction bond of only \$2,500.00” (Pet. Br. 16), petitioner omits that it already collected over \$582,000 (App. 239; *supra*, pp. 28-29). Petitioner likewise omits that its right to collect the balance of its judgments, should it ultimately prevail, is secured by bonds of \$300,000 (PX 326) and \$7,400,000 (PX 327), and a security agree-

ment (App. 271-75) which, together with the liens of the judgments, were continued “in full force and effect,” not to mention the other detailed security provisions contained in the order (App. 267-70).

#### D. The Court Of Appeals’ Decision.

The Court of Appeals affirmed the District Court on May 28, 1976. It did not pass upon the second (“in aid of jurisdiction”) exception to 28 U.S.C. §2283 since it held the first (“expressly authorized”) exception applicable. The Court found that Congress intended to afford private citizens “a uniquely federal remedy” when it enacted Section 16 of the Clayton Act. It also found that:

“This jurisdiction would be frustrated if federal courts did not have the power to enjoin a state court proceeding in an appropriate case. The present situation is a classic example. Here Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations” (App. 286).

Thus the Court held that the tests set forth in *Mitchum v. Foster*, 407 U.S. 225 (1972) had been satisfied. The Court of Appeals also affirmed as to comity and federalism (App. 289).

Contrary to petitioner’s assertion, the Court of Appeals did *not* “expressly [approve] the District Court’s assertion of jurisdiction to review a final decision of the Illinois Supreme Court” (Pet. Br. 16). On the contrary, it recognized that the District Court *expressly disclaimed* any power “to directly review cases from state courts,” and examined the state proceedings *only* to determine “whether Vendo prosecuted those cases as part of an anti-competitive scheme” (App. 289).

The Court of Appeals also rejected petitioner's contention that respondents failed to demonstrate a likelihood of ultimate success in proving their antitrust claims and did not satisfy the other requisites for injunctive relief (App. 289-91). It specifically rejected petitioner's argument that the state court judgments did not depend on the covenants not to compete since they were based on Stoner's violation of fiduciary duties. It held that this argument was "contrary to the trial judge's findings," which it affirmed (App. 290).

Finally, the Court of Appeals also rejected petitioner's contentions that the injunction was barred by laches, waiver and collateral estoppel, since those issues were not argued below and were "without merit" (App. 291). Despite this finding, petitioner urges its same "waiver" point here, under the heading of "comity and federalism" (Pet. Br. 36-39).

#### E. Subsequent Proceedings In The District Court.

This action is now pending trial in the District Court before the Hon. Hubert L. Will.\* In light of the death in March, 1976 of respondent Harry B. Stoner, his administrator, Ann Stoner, has been substituted as a plaintiff. The District Court also amended the preliminary injunction order to permit petitioner "to initiate or participate in any proceedings in [the probate of Stoner's estate]

\* Hon. Richard W. McLaren, who entered the order appealed from, died earlier this year.

which are available to creditors of an estate . . . to investigate and ascertain the nature and value of the assets properly belonging to the estate," except that it "shall not initiate citation proceedings for the recovery (as distinguished from discovery) of property, nor move for or otherwise attempt to obtain allowance of said claim, or accept any amounts in payment of said claim or any portion thereof."

The parties have been engaged in final preparation for trial.

### SUMMARY OF ARGUMENT

This case, as the Court of Appeals described it, presents a "classic example" (App. 286) in which petitioner, *prima facie* guilty of sweeping violations of both sections 1 and 2 of the Sherman Act, attempts by writs of execution "to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged [and found, *infra*, pp. 43-47] to be the very object of antitrust violations" (*Id.*).

The injunction at bar, tailored precisely to the exigencies of this case, effectively preserves the *status quo* so that respondents, as private attorneys general, may invoke the statutory remedies available *exclusively* in the federal courts for the private enforcement of the federal antitrust laws. Infringing no significant state interest, the preliminary injunction awarded by the District Court, and affirmed by the Court of Appeals, vindicates both the paramount national interest embodied in the antitrust laws and the special character of the exclusive federal antitrust jurisdiction entrusted by Congress to the federal courts.

I.

This is an interlocutory appeal from the award of a preliminary injunction, which only preserves the *status quo*, pending a trial upon the merits of respondents' federal antitrust claims. Apart from jurisdiction, the scope of appellate review is therefore limited to determining whether the District Court violated some principle of equity or clearly abused its discretion. The District Court's findings are closely intertwined with the issues at bar.

A.

One finding of the District Court goes to the heart of this case—that petitioner's collection of the balance of its state court judgments would further its violations of both sections 1 and 2 of the Sherman Act. Petitioner makes the startling, and utterly baseless, assertion that no such finding was made. But the District Court unequivocally found that petitioner's state court judgments depended on agreements violative of section 1 of the Sherman Act and were procured in pursuance of a monopolistic scheme violative of section 2 of the Sherman Act, and the Court of Appeals affirmed those findings.

B.

The District Court further found that continued collection of the state court judgments would eliminate two respondents from this case precluding the further prosecution of their claims, and would effectively cripple the third respondent's ability to prosecute the sole remaining antitrust claim. Therefore, absent equitable relief, immediate enforcement of petitioner's judgments would thwart the trial of federal antitrust claims.

II.

The District Court had jurisdiction to enjoin petitioner, *pendente lite*, from collecting the balance of its state court judgments. Both the first ("expressly authorized") and second ("in aid of jurisdiction") exceptions to the Anti-Injunction Statute, 28 U.S.C. §2283, applied.

A.

In appropriate cases §16 of the Clayton Act "expressly authorize[s]" injunctions against state proceedings under the first exception to §2283, as the Courts below held, in light of the controlling criteria set forth in *Mitchum v. Foster*, 407 U.S. 225 (1972). Under *Mitchum*, a federal statute need not refer in terms either to §2283 or to state court proceedings, but it must have created "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding" and "could be given its intended scope only by the stay of a state court proceeding" (407 U.S. at 237-38).

1. Supplementing the private enforcement provisions in the Sherman Act, §16 authorizes private plaintiffs to secure the "uniquely federal remedy" of injunctive relief in the federal courts. By its exclusive grant of federal jurisdiction Congress intended that federal antitrust enforcement be "effective and uniform" as well as "untrammelled" by the effects of related litigation in the state courts. *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied* 350 U.S. 825 (1955) (*per* L. Hand, J.).

2. Both the clear terms and legislative history of §16 show that its "intended scope" would be "frustrated" (*Mitchum, supra*) if federal courts could not enjoin state proceedings where, as here, the precise conduct proscribed by the antitrust laws is sought to be furthered therein. Furthermore, "Section 16 should be construed and applied" with a view toward "the high purpose" served by private antitrust enforcement. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).

3. Injunctions are not barred by §2283 when sought by federal agencies asserting "superior federal interests" (*Mitchum, supra*). The result should be no different when private antitrust plaintiffs seek to restrain state proceedings which "threaten loss or damage by a violation of the antitrust laws," since §16 was clearly intended to facilitate the vigorous enforcement of federal antitrust policy by private attorneys general. *Cf. Studebaker Corp. v. Gittlin*, 360 F.2d 692, 697-98 (2d Cir. 1966).

4. Affirmance of the injunction at bar would not impair the continuing vitality of §2283 because §16 authorizes relief *only* when state proceedings threaten "loss or damage by a violation of the antitrust laws," a showing made in *none* of the cases petitioner cites.

#### B.

The second exception to §2283 also applied since the preliminary injunction was "necessary in aid of" the District Court's jurisdiction. The District Court correctly found that, absent relief, two respondents would be, at least in substance, under petitioner's control or at its disposition, requiring their dismissal under Article III. The third respondent, Stoner's administrator, would then be unable to

prosecute the claims of Lektro-Vend and Stoner Inv., and her own ability to prosecute the sole remaining antitrust claim would be effectively crippled.

An injunction is permissible under the second exception to §2283 when state proceedings threaten "to seriously impair the federal court's flexibility and authority to decide" a case. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970). Here petitioner's collection proceedings would not only further violations of the Sherman Act; they also threaten the very extinction of federal antitrust claims, *prima facie* meritorious, depriving the federal court of its exclusive jurisdiction to adjudicate those claims. And this jurisdiction should be zealously protected because Congress, by conferring it exclusively upon the federal courts, intended to secure not only private rights but the national interest in the preservation of free competition.

#### III.

The decision below struck a proper balance between state and federal interests and is entirely in accordance with principles of comity and federalism. The Court below held those principles inapplicable not *only* because §16 affords an exclusive federal remedy but also in view of the peculiar nature of this case, namely, that it is based in part on the very proceeding sought to be enjoined.

This Court's recent decisions concerning comity and federalism do not require blind deference to state interests but a fair balancing of legitimate state and federal interests. Here the balance tips decisively in favor of federal interests, which are paramount.

1. Enjoining collection of petitioner's judgments, *pendente lite*, does not unduly infringe any legitimate state interest, since those judgments arose out of purely private litigation. Moreover, "special circumstances" exist since enforcement of those judgments would further violations of sections 1 and 2 of the Sherman Act.

2. On the other hand, paramount federal interests require that petitioner neither reap the fruit of its federal antitrust violations nor succeed in thwarting the prosecution of federal antitrust claims by private attorneys general.

#### IV.

Dismissal by Stoner and Stoner Inv. of their federal antitrust defense in the state court action did not preclude the award of injunctive relief. Such a result would unfairly penalize respondents in view of the circumstances: simultaneous pendency of state and federal actions was made necessary by petitioner's objections to removal; it was the understanding of the parties that the federal trial would follow the state trial, and the injunction only insures that a federal trial can take place; the federal defense was dismissed without prejudice and without objection, only after the state court dismissed the state antitrust defenses and counterclaim; the federal judge then presiding was reluctant to consider this case while federal antitrust issues were before the state courts; dismissal of the defense avoided the risk of conflicting state and federal decisions upon the same federal antitrust issues; and preliminary relief was based in part on actionable facts not in existence when the federal defense was dismissed. Respondents thus *did not* and *could not* have waived their rights to relief

upon their federal antitrust claims, which relief is obtainable *only* in a federal court. Moreover, federal jurisdiction to adjudicate federal treble damage claims is "untrammelled" by state court decisions upon federal antitrust issues. *Lyons v. Westinghouse, supra*.

Apart from respondents' own interests, dismissal of the federal defense could not have immunized petitioner's unlawful conduct because the overriding national antitrust policy is not to be left at the mercy of private parties nor subjected to the usual rules governing private litigation (*Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177 (1942)), particularly where, as here, the injunction prevents petitioner from enforcing its unlawful agreements and consummating its anticompetitive scheme in violation of sections 1 and 2 of the Sherman Act.

#### V.

The District Court neither reversed, reviewed nor revised the final judgments of the Illinois courts. It examined the state proceedings only to determine whether petitioner prosecuted them as part of an anticompetitive scheme. *What the District Court reviewed was not the Illinois judgments, but rather, petitioner's anticompetitive conduct in procuring those judgments.* Passing solely upon issues of federal antitrust law, the District Court found that petitioner sued and recovered on agreements violative of section 1 of the Sherman Act, and that it procured its judgments in pursuance of a monopolistic scheme violative of section 2 of the Sherman Act.

## ARGUMENT

### I.

**THE SCOPE OF THE REVIEW HERE, ASIDE FROM JURISDICTION, IS LIMITED TO DETERMINING WHETHER THE DISTRICT COURT VIOLATED SOME PRINCIPLE OF EQUITY OR CLEARLY ABUSED ITS DISCRETION.**

Provided there is no lack of jurisdiction (*United States v. Corrick*, 298 U.S. 435, 437-8 (1936)),

“It is well settled that the granting of a temporary injunction, pending final hearing is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. . . .”

“Especially will the granting of the temporary writ be upheld when the balance of injury as between the parties favors its issue.” *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923).

This is a well settled principle, particularly applicable when, as here, a preliminary injunction is issued merely for the purpose of preserving the *status quo* pending a determination of the action on the merits (*Bath Industries v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970)), because the district judge is typically presented with an abbreviated set of facts requiring a delicate balance of the probabilities of ultimate success at the final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief (*Scherr v. Volpe*, 466 F.2d 1027, 1030 (7th Cir. 1972)).\*

\* The District Court recognized this doctrine (App. 241 n.5).

Much of petitioner's brief is written as if this were a final appeal after trial. Authorities have established that, assuming jurisdiction, even if the reviewing court were to disagree with the trial court that the situation required the issuance of a preliminary injunction, such reversal would not be warranted (*Celebrity, Inc. v. Trina, Inc.*, 264 F.2d 956, 958 (1st Cir. 1959)). The Court of Appeals recognized this doctrine (App. 289-291).

Petitioner's brief largely ignores the detailed findings of facts by the District Court and in effect seeks to have this Court retry *de novo* the case the District Court tried and the Court of Appeals affirmed. Although petitioner assails the decision of the courts below on four grounds (Pet. Br. 2), the issues it poses are closely intertwined with the facts of this case. Those facts are reflected in the findings made by the District Court in the proper exercise of its judicial discretion. They receive scant, inaccurate and argumentative treatment by petitioner (Pet. Br. 14-16). They are vitally important and hence we treat them.

#### **A. The District Court Found That Petitioner's Efforts To Collect The Balance Of Its Judgments Would Further A Violation Of The Federal Antitrust Laws.**

Petitioner nowhere challenges the District Court's finding that collection of the balance of its state court judgments would further a violation of the Sherman Act—a finding which goes to the heart of this case. On the contrary, petitioner's brief makes the utterly startling assertion that no such finding was made. It says:

“The District Court, however, neither found nor held that enforcement of the judgments would violate the antitrust laws” (Pet. Br. 14).

Then, in a footnote, petitioner adds:

"The District Court also stated that, *'If the state court litigation was itself part of the anticompetitive scheme, a judgment arising from such litigation is not an ordinary debt'* (App. 238, italics added), and *'If federal law is violated by continuation of the state action the paramount national interest requires court intervention'* (App. 241, italics added), but reached no conclusion as to *whether* continuation of the state action (i.e., through collection of the state judgments) *would* violate the antitrust laws" (Pet. Br. 15 n.9; emphasis petitioner's).

This is desperation, to put it mildly. In the Court of Appeals petitioner specifically challenged the pertinent findings of the District Court, contending "that the state court judgments are based on Stoner's violation of fiduciary duties and do not depend . . . on the noncompetition covenants" (App. 290). The Court of Appeals rejected this contention, expressly noting that *it was "contrary to the trial judge's findings" (Id.)*.

And consider what the District Court said. In passing upon applicability of the first ("expressly authorized") exception to 28 U.S.C. §2283, the Court expressed *the very basis of its holding*:

"This Court therefore holds that [the federal anti-trust] laws, in the instant case, can only be given their intended scope by staying the state court proceedings and that §2283 authorizes an injunction *here where the state court proceedings are part of the anticompetitive scheme*" (App. 240-41).

What's "iffy" about that statement? Is it anything less than plain unequivocal language?

Even apart from what the District Court said, what it *held* equally belies petitioner's assertions. Seizing upon

selected "If" clauses in the Court's opinion, such as its statement that court intervention would be required "[i]f federal law is violated by continuation of the state action," petitioner underscores the "If" and says that the Court "reached no conclusion," ignoring the obvious fact that the Court *did* intervene. Indeed, that very "court intervention" provoked petitioner's appeal!

Moreover, the District Court held "that plaintiffs have demonstrated likelihood of ultimate success on *both* the section 1 and section 2 Sherman Act claims" (App. 233), and the very basis of petitioner's state court judgments was directly bound up with *both* of those claims. As the Court said:

"The section 1 claim does not rest alone on the theory that the state litigation was an essential part of an illegal anticompetitive scheme but rather depends on an analysis of the total circumstances surrounding creation of the 1959 agreements. The Court believes that viewed in this light the corporate opportunity theory relied on in the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants" (App. 234-35);

whereupon the Court delineated its further findings that Stoner's status as a director and his fiduciary duties were themselves but additional anticompetitive devices imposed on Stoner pursuant to the unlawful 1959 agreements (*Id.*).\*

\* It makes no difference that diversion of a corporate opportunity might be classified as a "tort," as petitioner contended in the Courts below, since the state law duties which Stoner was adjudicated to have breached arose out of and by virtue of the underlying anticompetitive agreements, as the District Court found (App. 234-35). Indeed, petitioner *bound* Stoner to become a director by those agreements, assigning to him no duties nor intending any, all in pursuance of its monopolistic scheme (*supra*, pp. 8-11).

Since petitioner's "anticompetitive clauses are essential primary elements of the bargain," they could not be severed from the rest of the transaction, thereby rendering "*all elements of the 1959 agreements unenforceable*" (App. 235). The Court concluded:

"Vendo's reliance on the ultimate theory of the state court litigation thus is not well taken. The 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart" (*Id.*).

Similarly the District Court expressly stated that respondents' claim under section 2 of the Sherman Act, if sustained, would furnish still *another basis* for holding further collection unlawful:

"If plaintiffs can prove that Vendo's state court litigation against the Stoner interests was not a genuine attempt to use the adjudicative process legitimately, antitrust liability in the instant case under section 2 of the Sherman Act would follow" (App. 237).

The Court not only held that respondents *did* sustain their section 2 claim (App. 233), but also delineated its findings in support of that claim (App. 235-38). Noting that it was "considering the record as a whole" (App. 237),\* the Court said:

"There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately" (*Id.*).

It also found that there was other "evidence that Vendo used litigation as a method of harassing and eliminating

\* Thus petitioner's italicized assertion that the District Court "cit[ed] only events in the 1963-66 period" (Pet. Br. 15) is baseless.

competition" (App. 236), as we have shown (*supra*, pp. 19-20, 20n.). Accordingly, since petitioner chose only to deny the existence of these findings, eschewing any claim that the District Court abused its discretion in making them, there can be no question but that enforcement of the state judgments would further petitioner's violation of sections 1 and 2 of the Sherman Act.

**B. The District Court Found That Immediate Collection By Petitioner Of The Balance Of Its State Court Judgments Would Thwart The Prosecution Of Federal Antitrust Claims.**

The District Court made explicit findings that petitioner's collection activities, unless restrained, would extinguish two of the three pending federal antitrust treble damage claims at bar:

"[C]ollection of the state judgment would effectively place Lektro-Vend in the hands of—or at least at the disposition of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments . . . . *Continued collection would thus eliminate two of the plaintiffs herein*" (App. 239).

Thus when petitioner says that the District Court found only that further collection might "*possibly eliminat[e]* two of the three plaintiffs in the suit as independent parties" (Pet. Br. 35), it misstates what the Court said. Moreover, in contending that it was "wrong on the facts" in making this finding (*Id.*), petitioner makes no effort to show that the District Court clearly abused its discretion—the standard of review upon an interlocutory appeal.

In any event, assuming that petitioner *does* claim an abuse of discretion, the record fully supports the pertinent findings. Neither of petitioner's proffered consent decrees would have obviated the elimination of Lektro-Vend or Stoner Inv. as federal antitrust plaintiffs.

Only the first proposed consent decree was before the District Court when it decided the motion for preliminary injunction. Petitioner states that this proposal, filed January 29, 1975 (App. 208-10),\* would have "preclude[d] Vendo's acquiring . . . control of Lektro-Vend" (Pet. Br. 13). It would have done nothing of the sort. It provided only for "the absence of any voting power in Vendo" through the device of a voting trust. It expressly contemplated that Vendo might be "the successful purchaser" of Lektro-Vend stock at a sheriff's sale, thus becoming the beneficial owner of all shares held in that voting trust (App. 210); and that those shares would be divested "at the fair market value [including the value of Lektro-Vend's right of action against petitioner?] at the earliest reasonable date" (*Id.*). As the District Court further found:

"Vendo's offer to place the Stoner Investments and Lektro-Vend stock under control of the Court does not meet this problem because *as a matter of substance* Vendo would control both plaintiff and defendant . . ." (App. 241).

\* In his counter-affidavit (App. 208) and attached letter (App. 210), which set forth the first consent decree proposal, petitioner's counsel implied that petitioner was previously unaware that Stoner Inv. had become majority shareholder in Lektro-Vend. The record shows, however, that petitioner well knew this *at the latest* in February, 1971, when it sought summary judgment based in part upon that very fact (See Item 52, pp. 2-3, Exh. "Q").

In fact, petitioner's proposal made no mention of Stoner Inv., as petitioner tacitly concedes (Pet. Br. 13).

Petitioner's second consent decree—proposed nearly three weeks *after* the District Court's decision—likewise fell short of preserving the viability of the two antitrust plaintiffs. Although purporting to prohibit petitioner from acquiring *for itself* any Lektro-Vend or Stoner Inv. stock or obligations, petitioner would have been wholly unrestricted from precipitating the immediate liquidation of the majority interest in both corporations, presumably including the forced sale of their federal antitrust claims at the very time when the District Court had directed the undertaking of final preparations for the trial of this action (App. 258-59; *supra*, pp. 28-29).

During the five day hearing on the motion for preliminary injunction, petitioner offered no evidence with respect to its proposal. On the contrary, the only pertinent evidence showed that, upon Lektro-Vend's forced liquidation, "without a viable organization there, the building and equipment wouldn't have any value" (Tr. 710-11), and that prospects for securing vitally needed financing would have been destroyed (Tr. 621-22, 706-15, 708-09).

Thus petitioner's latest offer, like its predecessor, did not upset the District Court's findings that "collection of the state judgment will effectively place Lektro-Vend . . . at least at the disposition of" petitioner (App. 238-39), or that "as a matter of substance Vendo would control both plaintiff and defendant" (App. 241). As the Court of Appeals concluded, petitioner "seeks to thwart a federal antitrust suit by the enforcement of state court judgments

which are alleged to be the very object of antitrust violations" and, absent equitable relief, federal antitrust jurisdiction "would be frustrated" (App. 286).\*

## II.

**THE DISTRICT COURT HAD JURISDICTION TO ENJOIN PETITIONER, PENDENTE LITE, FROM COLLECTING THE BALANCE OF ITS STATE COURT JUDGMENTS. THE FIRST TWO EXCEPTIONS TO 28 U.S.C. §2283 APPLIED HERE.**

**A. The Preliminary Injunction Was Expressly Authorized By §16 Of The Clayton Act, Within The Meaning Of 28 U.S.C. §2283.**

The parties are agreed that the determination of this question must rest squarely on the principles which this Court, in *Mitchum v. Foster*, 407 U.S. 225 (1972), distilled

\* A wealth of additional evidence in the record amply supported the findings below that petitioner sought by its collection proceedings to thwart the prosecution of this antitrust suit. Thus in April, 1975, petitioner's counsel announced his intention forthwith to institute "maybe twenty-five lawsuits" and to reactivate a contempt proceeding against Stoner and Stoner Inv. which had lain dormant in state court "for about eight years" (*supra*, p. 30n.).

In June, 1975, petitioner again insisted that it be permitted to investigate "questionable conduct" on the part of "[p]laintiffs and their lawyers" before the state courts and to pursue creditor's suits against Stoner's wife, his son and his sister-in-law and "about thirty-five other people," all in all, "some thirty-five or forty in name" (Tr., June 19, 1975, pp. 34-35; App. 247, 252-53).

The predicate for the contempt charges, the alleged "questionable conduct," and the host of lawsuits, was petitioner's charge of "monumental fraud" upon which it cross-examined (Tr. 628-748) and recross-examined (Tr. 885-89) Stoner at the hearing. The District Court found the charge groundless (App. 239), and petitioner did not appeal its finding.

from the prior cases applying the "expressly authorized" exception of §2283:

"In the *first* place, it is evident that, in order to qualify under the 'expressly authorized' exception of the anti-injunction statute, a federal law *need not contain an express reference to that statute*. . . .

"*Secondly*, a federal law *need not expressly authorize an injunction of a state court proceeding* in order to qualify. . . .

"*Thirdly*, it is clear that, in order to qualify as an 'expressly authorized exception to the anti-injunction statute, an Act of Congress must have created a *specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding*. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibitions of the anti-injunction statute. *The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding*" (407 U.S. at 237-38).

Both the District Court and the Court of Appeals analyzed the injunction here *in precisely these terms*. They concluded that §16 opened the federal equity courts to private citizens, creating a uniquely federal remedy which would be frustrated if the federal courts did not have the power to restrain the enforcement of a state court judgment in an appropriate case (App. 240-41, 285-89). But their holding was carefully limited. Judge McLaren held that "§2283 authorizes an injunction here where the state court proceedings are part of the anticompetitive scheme" (App. 240-41); the Court of Appeals likewise held this

to be an appropriate case on the grounds that "Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations" (App. 286).

Neither "judicial improvisation" nor "loose statutory construction" nor "*ad hoc* expansion of the exceptions to [§2283]" (Pet. Br. 23) was necessary to support that holding. Rather, the decision below, that §16 "expressly authorized" the preliminary injunction at bar, was fully justified by the language, by the legislative history, and by the clear intent of that statute.

**1. Injunctive Relief Under §16 Of The Clayton Act Is A "Uniquely Federal Remedy," Entrusted By Congress To The Exclusive And Untrammelled Jurisdiction Of The Federal Courts.**

By enacting the Sherman Act of 1890, Congress supplemented the varying common law rules administered by the states with a uniform federal law. Common law merely voided unreasonable restraints, denying them enforcement. The Sherman Act, on the other hand, established positive prohibitions, outlawing trade restraints and monopolization as crimes. Federal equity powers were made available, and special provision was made to supplement government enforcement by private suits on the part of antitrust victims, who were to be awarded treble damages and reasonable attorneys' fees and costs upon recovery. By §16 of the Clayton Act, the federal courts were empowered as well to grant equitable relief at the behest of private plaintiffs.

The three positive remedies afforded private plaintiffs under these statutes—treble damages, the statutory award

of fees and costs, and equitable relief—could be invoked only in the federal district courts. In *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) (*per* L. Hand, J.), the exclusive character of this jurisdiction was held to manifest a Congressional design that it not be impaired or limited by virtue of related litigation in the state courts:

"In the case at bar it appears to us that the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that make up the wrong. The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposed a punitive purpose. It is like a *qui tam* action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign. There are sound reasons for assuming that such recovery should not be subject to the determinations of the state courts. It was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being national in scope. Relief by certiorari would still exist, it is true; but that is a remedy bothersome to litigants and to the Supreme Court, already charged with enough. Obviously, an administration of the Acts, at one effective and uniform, would best be accomplished by an untrammelled jurisdiction of the federal courts."

The court then held that the plaintiff's treble damage action was not precluded even though a state court had previously found that the alleged antitrust violation, which had been raised by way of defense in the state action, was neither sustained nor established.

The basic rationale of *Lyons* is that no local law or state court determination may be permitted to defeat the jurisdiction of the federal courts to enforce the overriding federal public policy of the antitrust laws. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177 (1942); *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 401 (2d Cir. 1968); *Mach-Tronics, Inc. v. Zirpoli*, 316 F. 2d 820, 830 (9th Cir. 1963).

Because a defense based on federal antitrust law was available in the state proceedings here, petitioner argues (Pet. Br. 30) that the present injunction does not meet *Mitchum's* "uniquely federal remedy" requirement. This is an obvious *non sequitur*. If a remedy which affords private plaintiffs in the capacity of private attorneys general treble damages, fees and costs and equitable relief procurable *only* in a federal court is not a "uniquely federal remedy," it is difficult to conceive of one. And the fallacy of petitioner's argument is further apparent from an examination of the authorities.

In *Mitchum*, the federal issues upon which an injunction was sought were also available as a defense to the state action; nevertheless §1983 was held to constitute a "uniquely federal remedy." Similarly in *Porter v. Dicken*, 328 U.S. 252, 255 (1946), the Emergency Price Control Act was held to expressly authorize the federal court's injunction against a state eviction suit, even though the Act invested both the state and federal courts with jurisdiction to enforce its provisions (56 Stat. 33). The District Court in *Porter* had concluded that §2283 forbade the injunction because of the availability of a *concurrent* state court remedy. Even so, this Court rejected that contention! (328 U.S. at 234-35).

**2. Both The Clear Terms And Legislative History Of §16 Show That Its "Intended Scope" Would Be "Frustrated" If Federal Courts Were Powerless To Issue An Injunction Where Antitrust Violations Are Furthered By Collection Of State Court Judgments.**

The language of §16 is sweeping: "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . .," subject to the ordinary principles and rules of equity proceedings.

Thus the preliminary injunction at bar was authorized by the plain terms of the statute, since the District Court found on the facts that the immediate collection of the state court judgment would have *threatened loss or damage* to respondents *by a violation of the antitrust laws*—in fact, by violations of *both* sections 1 and 2 of the Sherman Act.

The same reasoning guided this Court in *Porter v. Dicken*, *supra*, cited in *Mitchum*, 407 U.S. at 235 n.17. The statute construed there was §205(a) of the Emergency Price Control Act (56 Stat. 33):

"Whenever in the judgment of the Administrator any person has engaged or is about to engage *in any acts or practices which constitute a violation of any provision* of section 4 of this Act, he may make an application to the appropriate court for an order enjoining such acts or practices . . ."

The Court held that "this authority is broad enough to justify an injunction to restrain state court evictions" which violated the Act (328 U.S. at 255).

Petitioner argues that the prohibitions of §2283 are incorporated into §16 by its language: "When and under the same conditions and principles as injunctive relief . . .

is granted by courts of equity, under the rules governing such proceedings" (Pet. Br. 23-24). Rather, it is obviously more reasonable to read this language as referring to the traditional doctrines of equity jurisprudence concerning requirements for injunctive relief, which requirements were fully applied by the District Court *before* it considered whether plaintiffs had met their "special burden" under §2283 and "comity and federalism" (App. 239).

It is clear that at the time of the passage of the Clayton Act, §2283 was regarded as a much less inflexible prohibition than it later became under *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941). See *e.g.*, *Sovereign Camp v. O'Neill*, 266 U.S. 292, 298 (1924); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920); *Ex Parte Simon*, 209 U.S. 144 (1908); and *Marshall v. Holmes*, 141 U.S. 589 (1891). This makes it impossible to argue that "the text of the statute" incorporated any absolute prohibition of injunctions against state court proceedings (Pet. Br. 23-24).

Furthermore, petitioner's reading of §16 is precluded by the familiar rule of statutory construction, that "*inclusio unius est exclusio alterius*." Section 16 specifically prohibits injunctions against common carriers subject to the jurisdiction of the Interstate Commerce Commission. It makes no reference whatsoever to injunctions against state court proceedings.

The decision of the Courts below is also supported by the clear legislative intent of §16. Prior to its enactment in 1914, though private antitrust plaintiffs could sue for treble damages, they were barred from seeking injunctive relief, which could be granted only at the behest of the government. Section 16 was consistently described as a measure undertaken to remedy this situation, which was

perceived as a significant defect in the Sherman Act.\* Rep. Carlin described the Judiciary Committee's deliberations as follows:

"First, we found that the Sherman law did not permit an injunction on petition of an individual. The government could enjoin a combination or a trust; and though an individual was standing face-to-face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages" (51 Cong. Rec. at 9270).

So the clear and simple intent of §16 is to allow an individual to have anticompetitive behavior enjoined by a federal court of equity before it destroys him. Where a party's prosecution of state proceedings is found to be "part of the anticompetitive scheme" (App. 241), then surely §16 can "be given its intended scope only by a stay of the state court proceedings" (*Mitchum*, 407 U.S. at 715). Where "federal law is violated by continuation of the state action" and "the *precise conduct* proscribed by the antitrust laws is sought to be furthered in [the] state court action" (App. 237, 238, 241; *supra*, pp. 43-47), then surely the federal remedy of §16 would "be frustrated if the federal court were not empowered to enjoin a state court proceeding" (*Mitchum*, 407 U.S. at 237).

After all, this Court in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 130-31 (1969), told us, in language particularly applicable here, how §16 should be construed:

\* See Note, The Federal Antitrust Laws and the Anti-Injunction Statute: Conflict and Coexistence, 42 Geo. Wash. L. Rev. 115, 138-144 (1973); H. R. Rep. No. 627, p. 17; S. Rep. No. 698, 63rd Cong., 2d Sess. (1914); 51 Cong. Rec. 9261-62, 9270, 15944, 16275, 16319 (1914).

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws . . . . *Section 16 should be construed and applied with this purpose in mind . . . . Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.'*"

Zenith's footnote 24, setting out §16, italicizes "against threatened loss or damage by a violation of the antitrust laws" (395 U.S. at 130 n.24).

Despite *Mitchum's* holding that "a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify . . ." (407 U.S. at 237), petitioner argues that a statute will pass muster under *Mitchum* only where its *legislative history* expressly shows a conscious and central Congressional intent to restrain abuses of state court proceedings (Pet. Br. 27-29, 32). But there is nothing in the language or the logic of *Mitchum* which requires such a limitation of its holding. Quite the contrary, the invalidity of any such limitation is evident when one examines the "previously recognized statutory exceptions" which *Mitchum* catalogued and from which it distilled its criteria.

For instance, the Emergency Price Control Act was held to constitute an exception to §2283 because of the breadth of the injunctive power authorized by the Act, despite the absence of any indication that Congress had ever expressly considered any need for injunctions against state court proceedings (*Porter v. Dicken, supra*, 328 U.S. at 255, cited in *Mitchum*, 407 U.S. at 235) \* The same was true of the Fair

\* Petitioner attempts to distinguish *Porter v. Dicken* on the ground that the Emergency Price Control Act "provided an in-  
(footnote continued on following page)

Labor Standards Act (*Walling v. Black Diamond Coal Mining Co.*, 59 F. Supp. 348, 351 (W.D. Ky. 1943), cited in *Mitchum*, 407 U.S. at 237 n. 25); the Public Utility Holding Company Act (*Okin v. S.E.C.*, 161 F.2d 978, 980 (2d Cir. 1947), cited in *Mitchum*, 407 U.S. at 237 n. 25); and the Securities and Exchange Act (*Studebaker Corp. v. Gittlin*, 360 F. 2d 692 (2d Cir. 1966), cited in *Mitchum*, 407 U.S. at 237 n. 25).

### 3. The "Intended Scope" Of §16 Would Be Frustrated Were Petitioner Permitted To Consummate Its Antitrust Violations And Thwart Private Enforcement Of The Antitrust Laws.

In canvassing the exceptions to §2283 which had been recognized in prior decisions, *Mitchum* noted that "other 'implied' exceptions to the blanket prohibition of the anti-injunction statute" had been recognized (407 U.S. at 235).

tricate system of judicial remedies and authorized the Government to enforce the Act in both federal and state courts" (Pet. Br. 31).

But even granting the arguable assumption that the Emergency Price Control Act provided a more "intricate system of judicial remedies" than do the antitrust laws, the fact is that *Porter* relied on no such ground, but rather on the breadth of the injunctive power authorized by the Act. As this Court explained in *Mitchum*:

"[T]he Emergency Price Control Act . . . provided that the Price Administrator could request a federal district court to enjoin acts that violated or threatened to violate the Act. In *Porter* we held that this authority was broad enough to justify an injunction to restrain state court proceedings." (407 U.S. at 235 n.17).

As for the Government's authorization to enforce the Act in both federal and state courts, *Porter* mentioned this *only* for the purpose of overruling the District Court's conclusion that the Administrator was required to pursue his injunction in the state courts (328 U.S. at 254-55).

Citing, *inter alia*, *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), *Mitchum* stated:

“Still a third exception, more recently developed, permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting ‘superior federal interests’ ” (407 U.S. at 235-36).

This same exception to §2283 was also noted by the Second Circuit in *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), a decision which *Mitchum* cited (407 U.S. at 237 n. 25). In *Studebaker*, a private litigant sought to enjoin a state court action whose prosecution furthered a violation of the proxy rules under the Securities Exchange Act. In an opinion by Judge Friendly, the court initially recognized that, under *Leiter Minerals, supra*, and other cases, §2283 would not have precluded an injunction against the state action had it been sought by a federal agency. Noting that Congress had intended to enlist the aid of private litigants to secure the “effective enforcement of the Exchange Act and SEC rules,” the court then held that the exception to §2283 available for government prosecutors was also available to private plaintiffs:

“... [T]here is little question that if the Commission had sought the injunction here, §2283 would not have blocked its way. We are not persuaded that a different decision is compelled under the circumstances of this case. *If the policy of the anti-injunction statute is superseded by the need for immediate and effective enforcement of federal securities regulations and statutes, the fact that enforcement here is by a private party rather than the agency should not be controlling.* The Supreme Court has recognized such a suit as being ‘a necessary supplement to Commission action’ in providing the protection for investors contemplated by the statute . . . . The situation is quite different from that in labor relations where Congress has vested

the sole right to seek injunctive relief to prevent violations of the Act in the National Labor Relations Board\* . . . . *Section 16 of the Clayton Act . . . affords a closer parallel, since there as here the private suit plays an important role in enforcement*” (360 F. 2d at 697-98).

The opinion then went on to distinguish other cases (including *Lyons I* (Pet. Br. 24, 25, 34) and *Red Rock (Id. at 34, 37)*) on the ground that the state proceedings attacked therein did not themselves involve any violation of the antitrust laws (*Id.*).

Judge Friendly’s assessment of the intended scope of §16 is in full accord not only with the legislative history of that statute but also with this Court’s own construction. In *Zenith Radio Corp., supra*, 395 U.S. at 130-31, this Court recognized that:

“[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws . . . . Section 16 should be construed and applied with this purpose in mind . . . *Its availability should be ‘conditioned by the necessities of the public interest which Congress has sought to protect.’* ”

Likewise in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968), the Court declared that the “*overriding public policy*” embodied in the antitrust laws would best be served “by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of [those] laws.”

\* This disposes of *Amalgamated Clothing Workers* (Pet. Br. 22, 29, *Id.* n.13, 33) which involved the National Labor Relations Act, whose enforcement is wholly reserved to a federal agency.

Under *Leiter Minerals* and *Studebaker*, *supra*, it is clear that, because of the national interest involved, §2283 would not prevent the Justice Department from obtaining an injunction against a state court action whose enforcement furthered antitrust violations. The result should be no different here, where the enforcement of the antitrust laws is entrusted to a "private attorney general." The same "overriding public policy" is at stake.

As the lower Courts recognized, the present case is no mere private squabble. Judge McLaren granted the injunction, and the Court of Appeals affirmed it, because "the paramount national interest requires court intervention" (App. 236, 238, 241, 288). To deny the preliminary injunction here would not only deprive private parties of their uniquely federal remedies; more importantly, it would hamper the enforcement of the national public interest in free competition, and thus defeat the intended scope of §16 of the Clayton Act.

#### 4. Affirmance Of This Preliminary Injunction Would Not Impair The Continuing Vitality Of §2283.

Petitioner sounds the tocsin that affirmance here "would reduce the highest tribunals of any state to the status of special masters subject to *de novo* control by a single district judge"! (Pet. Br. 21). Other special masters "could be preliminarily enjoined under myriad other federal statutes as well" (*Id.*), namely, under "every federal statute authorizing injunctive relief" (Pet. Br. 18, 30-31). Hyperbole is not a very effective weapon.

There is no question here of exempting from §2283 "every federal statute authorizing injunctive relief." What is in issue, rather, is a statute providing a uniquely federal in-

junctive remedy, whose clear intent is to enlist the aid of private litigants in the enforcement of the overriding federal policy embodied in the antitrust laws, over which the federal courts have exclusive and untrammelled jurisdiction.

Nor is the issue here the exemption of *every antitrust injunction* from the prohibition of §2283. Section 16 only authorizes injunctions against "threatened loss or damage by a violation of the antitrust laws." Here the District Court granted the injunction only after finding that the state court proceeding was part and parcel of a violation of the antitrust laws, and that the intended scope of §16 would therefore be frustrated if a federal court were powerless to enjoin it, *pendente lite*.

Thus the decision below in no way conflicts with cases, such as those cited by petitioner (Pet. Br. 24 n. 24, 25-26), in which the alleged antitrust violation was only *collateral* to the state court action. As *Studebaker* noted (320 F. 2d at 698), neither *Lyons I* (Pet Br. 24, 25, 34) nor *Red Rock* (*Id.* at 34, 37) involved a showing by the federal plaintiff that the state proceeding sought to be enjoined itself offended the federal statute. All these cases\* involved actions "for collection of ordinary debts for goods delivered or services rendered" and not actions "to enforce the very conduct . . . prohibited by the Clayton or Sherman Act" (*Helpfenbein v. International Industries, Inc.*, 438 F.2d 1068, 1071 (8th Cir. 1971)).

On the other hand, courts have enjoined state suits under the antitrust laws when those suits "are in furtherance of an illegal act" (*Katz Drug Co. v. Schaeffer Pen*

\* The same is true of all the other cases petitioner cites: *Am. Mfrs.*, *Avon Pub. Co.*, *Bascom Launder*, *Carter*, *Reines* and *Potter* (Pet. Br. 24 n.24, 25-26) (see *infra*, pp. 67, 69).

Co., 6 F. Supp. 212, 214 (W.D. Mo. 1933)), or when necessary "to prevent the defendants from acquiring any of the fruits of the condemned project" (*United States v. Bayer*, 135 F. Supp. 65, 73 (S.D.N.Y. 1955); see also *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 494, 514, 517-19 (E.D. Pa. 1972)). Thus we do not ask this Court to obliterate "a previously settled interpretation of §2283 and §16" (Pet. Br. 24).

Finally, as the Court of Appeals declared, the facts here reflect a "classic example" of the impending frustration of uniquely federal remedies. Not only do Vendo's enforcement actions violate the Sherman Act, they threaten the extinction of the very right to redress that violation in a courtroom (*supra*, pp. 47-50).

**B. The Preliminary Injunction Was "Necessary In Aid Of" The District Court's Jurisdiction Within The Meaning Of The Second Exception To 28 U.S.C. §2283.**

The District Court held that the injunction was "necessary in aid of" its jurisdiction and thus qualified under the second exception to 28 U.S.C. §2283. The Court of Appeals did not pass upon this question, since it upheld the District Court under the "expressly authorized" exception to §2283.

The District Court's decision was correct. Petitioner entirely misconstrues what the Court held and ignores what it found. There is no question but that petitioner's "further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp.," together with their respective federal antitrust claims. Absent the injunction those plaintiffs would be, at least in substance, under peti-

tioner's control or at its disposition (App. 238-39; 241). Petitioner does not contend that the District Court abused its discretion in making these findings which, in any event, are squarely based upon the evidence (*supra*, pp. 47-50).

Petitioner argues that "irrespective of Stoner Investments and Lektro-Vend" the remaining antitrust plaintiff—Stoner's administrator—"would continue to be an adverse party and, therefore, the District Court would not in any event be deprived of jurisdiction under Article III" (Pet. Br. 35). But petitioner would be the first to object should Stoner's administrator try to continue the prosecution of *the two federal antitrust claims* of Lektro-Vend and Stoner Inv. Absent relief, the District Court would be left with but one federal antitrust claim, and even that claim could not be prosecuted "effectively" (App. 239). The antitrust claims of Stoner Inv. and Lektro-Vend would be placed upon the auction block of the sheriff. Obviously Article III would require dismissal of those two claims, as the District Court held (App. 241), not to mention that this would also spell the demise of petitioner's competitor.

In *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970), this Court described the "in aid of jurisdiction" exception to §2283:

"[W]e conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal *injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.*"

Here petitioner seeks not merely "to seriously impair the . . . flexibility and authority" of the District Court to de-

cide this case; indeed, it seeks to “eliminate two of the plaintiffs herein” (App. 239).

When two meritorious antitrust claims are subject to imminent *extinction* in furtherance of an anticompetitive scheme, then the need for federal injunctive relief, under *Atlantic Coast Line*, is absolutely compelling. Far more is at stake than mere “flexibility and authority” to decide those claims; without court intervention the claims themselves would disappear. As the District Court put it in *Lyons I* (Pet. Br. 24, n. 10, 25, 34), an injunction “in aid of jurisdiction” *would* lie when “such restraint is *absolutely necessary to preserve the integrity* of the Federal court’s jurisdiction” (109 F. Supp. at 925), precisely the case at bar.

None of the other cases cited by petitioner involved any threat to the very exercise of federal jurisdiction such as petitioner’s collection proceedings—in furtherance of its antitrust violations—posed in this case. On the contrary, the grounds upon which courts have rejected injunctions in other cases directly support the injunction here. The Second Circuit’s recent decisions in *Jennings* (Pet. Br. 33-34) and *Vernitron* (*Id.* at 34) are particularly instructive. In *Jennings*, petitioner’s “procedurally very similar” case (*Id.* at 33), the Court found that execution of “the state court judgments did not constitute an impediment to the assertion of the federal right or remedy” (482 F. 2d at 1131); that it was “not enough that the requested injunction is *related* to [federal jurisdiction], but it must be ‘necessary in aid of’” that jurisdiction (482 F. 2d at 1134-35).

Likewise in *Vernitron* (Pet. Br. 34) the “only conceivable interference” with federal jurisdiction was *the possibility* that the state court might attempt to determine issues of federal law; this, however, hadn’t occurred

and “in any event would be wholly without effect” (440 F. 2d at 108). And in *Vernitron* the Second Circuit *did* say that §2283 *does* authorize injunctions “in those situations where *the real or potential conflict threatens the very authority of the federal court*” (*Id.*). Here the threatened conflict is not “potential” but “real” and “the very authority of the federal court” is indeed at stake.

That both *Jennings* and *Vernitron* support the injunction at bar is further demonstrated by the fact that *both* cases distinguished the Second Circuit’s earlier decision in *Studebaker*, *supra*, pp. 60-62, upon the identical ground: the state proceedings sought to be enjoined “did not constitute a furtherance of an ongoing violation of the Securities Exchange Act” (*Jennings*, 482 F. 2d at 1131; *Vernitron*, 440 F. 2d at 108). But the threat to federal jurisdiction here stems *directly* from petitioner’s antitrust violations (*supra*, pp. 43-47). This also disposes of *Red Rock* (Pet. Br. 34; see 195 F. 2d at 409, as well as *Glenn W. Turner* (Pet. Br. 33, 34, 36).

*Turner* (*Id.*) is patently inapt. It specifically found that the state suit did *not* “by its very nature [further] a violation of” federal law; on the contrary, it was prosecuted by a state attorney general and was “consistent with the goals of the federal securities laws” (421 F. 2d at 781). Moreover, unlike the plaintiffs in *Turner*, we do not seek to enjoin petitioner’s creditors and preserve its solvency so as “to facilitate the collection of judgments” which we might subsequently be awarded in this action (*Id.* at 780). Rather we seek to uphold an injunction which bars petitioner from “facilitat[ing] the collection of [its] judgments” and thwarting the very exercise of *the District Court’s exclusive jurisdiction* over our meritorious federal antitrust claims. The issue therefore is not petitioner’s

solvency but whether there can be a trial upon antitrust claims in the only tribunal empowered to pass upon those claims.

Finally, the need to preserve the jurisdiction of the District Court over the claims at bar is particularly compelling in light of the "overriding public policy" embodied in the antitrust laws (*Perma Life Mufflers, supra*) and "the necessities of the public interest which Congress has sought to protect" (*Zenith Radio Corp., supra*).

### III.

#### THE PRELIMINARY INJUNCTION STRIKES A PROPER BALANCE BETWEEN STATE AND FEDERAL INTERESTS AND THUS IS FULLY IN ACCORD WITH PRINCIPLES OF COMITY AND FEDERALISM.

The Court of Appeals said:

"The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court. We are in agreement with the trial court's observation:

'Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention'" (App. 289, quoting App. 241).

Charging that the Court below sanctioned a "flagrant abuse of federal equity power," "a mockery of the concept of federalism," and an "insult to the processes of a state judicial system" (Pet. Br. 38, 39), petitioner seriously overstates what the Court actually held. Contrary to petitioner's assertion (*Id.*), the Court did *not* hold that prin-

ciples of comity and federalism were inapplicable in *any* action under §16 of the Clayton Act simply because §16 affords an exclusive remedy in the federal courts. Quite the contrary, the Court of Appeals specifically adopted what the District Court said about "the peculiar nature of this case," namely, that it "is based in part on the very proceeding sought to be enjoined" (*supra*). Indeed, as the Court of Appeals noted (App. 290), the District Court *found* that the judgments petitioner sought to enforce depended on unlawful agreements and were obtained in pursuance of an anticompetitive scheme, contrary to sections 1 and 2 of the Sherman Act (*supra*, pp. 43-47).

Thus we dispose of petitioner's asserted "direct conflict with decisions of the Fifth Circuit" (Pet. Br. 38), which is illusory. *Response of Carolina (Id. at 37)* denied injunctive relief under §16 precisely because "the contract provisions sued on in the state court do not embody or further the anti-competitive practices" (498 F. 2d at 319); and *Red Rock* (Pet. Br. 37) likewise expressly recognized "that cases could arise in which a State Court proceeding could be properly considered to threaten 'a violation of the Anti-Trust laws' so as to come within" the express terms of §16 (195 F. 2d at 409). Both of petitioner's cases thus clearly envisaged federal court intervention, as here, upon a showing that "federal law is violated by continuation of the state action" (App. 241, 289), not to mention that further collection here would "thwart a federal anti-trust suit" (*supra*, pp. 47-50).

The issue that remains here can be stated simply: should the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) be extended to bar the preliminary injunction in the present case?

In *Younger v. Harris* (Pet. Br. 36), the Court reversed an injunction against a pending state criminal prosecution based upon the concept of "Our Federalism." The Court's opinion (per Black, J.) described this concept as follows:

"The concept does not mean blind deference to 'State's Rights' any more than it means centralization of control over every important issue in our National Government and its courts . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" (401 U.S. at 44).

The Court then held that, absent "special circumstances" (*Id.* at 41, 45-49, 53-54), "the incidental 'chilling effect' of a potentially unconstitutional state statute upon the exercise of first amendment rights "does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution" (*Id.* at 51-52).

Then in *Huffman v. Pursue, supra* (Pet. Br. 37), the Court held that the principles of equity, comity and federalism canvassed in *Younger* also forbade federal restraint of a state civil proceeding which was quasi-criminal in nature. The District Court had enjoined the enforcement of a state court order closing down a movie theatre as a result of a prosecution by a county attorney under a state nuisance abatement statute. The Supreme Court quoted what *Younger* said about "not unduly interfer[ing] with the legitimate activities of the States" (420

U.S. at 601); it then found that the particular state proceeding involved was "*more akin to a criminal prosecution than are most civil cases*," noting specifically that the state was a party, and that the proceeding was "both in aid of and closely related to criminal statutes" pertaining to obscenity (*Id.* at 604). The Court concluded that:

"... an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding . . . Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws" (*Id.* at 604-05).

That the holdings of *Younger* and *Huffman* do not extend across the board to all civil proceedings was clearly reflected in both the majority and dissenting opinions in *Colorado River Water Conservation District v. United States*, 47 L. Ed. 2d 483, 497-98, 500-01, 504 (March 24, 1976). What is required is not a "blind deference" to state interests, but rather a fair balancing of the "legitimate interests of both State and National Governments" (*Younger, supra; Huffman, supra*). When the present case is analyzed in these terms, it becomes clear that this preliminary injunction did not offend principles of comity and federalism.

**A. Enjoining Collection Of Petitioner's Judgments, Pendente Lite, Did Not Unduly Infringe Any Significant State Interest.**

The District Court recognized that "the principles of comity and federalism militate against unnecessarily in-

terfering with pending state court actions even if §2283 is satisfied" (App. 240, citing *Mitchum, supra*).

But the state interest involved here falls far short of the interests at stake in the previous cases where this Court held federal injunctive relief to be inappropriate. This state action was not a criminal proceeding (*Younger, supra*).<sup>\*</sup> Nor was it "akin to a criminal prosecution," where a federal injunction would "[disrupt the] State's efforts to protect the very interests which underlie its criminal laws . . ." (*Huffman, supra*). There was no interference here with state executive officers (*Rizzo v. Goode*, Pet. Br. 36); or the state's collection of its taxes (*Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943)); or the state's certification of its delegates to a national political convention (*Cousins v. Wigoda*, Pet. Br. 36; see *Id.*, 463 F. 2d 603, 606-07 (7th Cir. 1972)).<sup>\*\*</sup>

Rather, the interests advanced in the state court action here were those of a private party—a private party, indeed, which has been found *prima facie* guilty of violations of both sections 1 and 2 of the Sherman Act. Neither the State of Illinois nor any state official was a plaintiff here. Quite the contrary, *respondents'* repeated attempts to gain relief under Illinois antitrust law were supported, not

<sup>\*</sup> As Mr. Justice Stewart stated in *Younger*: "The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, *the State might not even be a party to a proceeding under a civil statute.*" (401 U.S. at 55 n.2, concurring opinion).

<sup>\*\*</sup> Mr. Justice Rehnquist, while warning in *Cousins* that federal courts should not "casually enjoin the conduct of pending state court proceedings of either civil or criminal character, also noted that "the test to be applied may be less stringent in civil cases than in criminal" (409 U.S. at 1206).

only by the Illinois attorney general, who appeared as *amicus curiae* during both state court appeals (See App. 99), but even by the Illinois legislature (*supra*, p. 21).

The District Court did not overturn any Illinois statute, nor did it reverse any state court interpretation of Illinois statutory or common law. And there was no disruption of the ongoing state adjudicatory process. While we recognize that petitioner's collection activities qualify as "state proceedings" for purposes of §2283, surely temporary intervention during this phase of the state proceedings presents a far less sensitive situation than would have been presented by federal interference in the state court's ongoing adjudication of the substantive issues in the case.

And petitioner's right to collect the balance of its judgments, should it ultimately prevail, "remains well protected" by substantial bonds, a security agreement and the continued pendency of the judgment liens (App. 242; *supra*, pp. 32-33). Thus any indirect state interest in the collection of those judgments is also protected. Certainly there was no affront to state interests when petitioner volunteered a "standstill agreement" while the District Court passed on respondents' claims at the preliminary injunction hearing (*supra*, pp. 29-30); a "standstill order" during the trial of those claims—which the parties had always anticipated (*supra*, pp. 27-28)—should have no larger effect.<sup>\*</sup>

<sup>\*</sup> This injunction was carefully designed to impose the minimum restraint necessary to assure prompt and effective adjudication of the treble damage claims. Thus, for example, the order provided that while petitioner should not reactivate the dormant contempt proceedings, the state court might freely do so *sua sponte* (App. 269-70). Also, the recent modification of the order (*supra*, pp. 34-35) permits petitioner to undertake discovery in the state court but not to secure further turnover orders.

Finally, as *Younger* and *Huffman* noted, federal abstention is inappropriate in certain circumstances: in cases of bad faith prosecution, harassment, or prosecution under "flagrantly and patently" unconstitutional statutes (401 U.S. at 53-54; 420 U.S. at 601, 611).

But similar circumstances are presented in this case. The District Court found "persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt use the adjudicative process legitimately" (App. 237). Moreover, the agreements upon which the petitioner sued and recovered were indeed flagrantly and patently violative of the Sherman Act (App. 233-35). Thus, Mr. Justice Stewart's observation in *Younger* is particularly appropriate:

"In such circumstances the reasons of policy for deferring to state adjudication *are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights*" (401 U.S. at 56 (concurring opinion)).

Here the Illinois judicial process, which petitioner says should be vindicated, was found to have been employed by petitioner as part and parcel of its scheme to monopolize trade and enforce agreements violative of the Sherman Act.

#### **B. Paramount Federal Interests Required The Issuance Of This Preliminary Injunction.**

As against whatever state interests may be at stake, the federal interests at bar are paramount. Respondents prosecute this case in a federal district court invested by Con-

gress with an exclusive jurisdiction to pass upon the claims at bar. Congress so acted, not to demean the state courts, but because "an administration of the Acts, at once effective and uniform would best be accomplished by an untrammelled jurisdiction of the federal courts" (*Lyons*, 222 F. 2d at 189). They prosecute this case as private attorneys general not merely to secure "private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws" (*Zenith Radio Corp.*, 395 U.S. at 130-131). And the determination of that policy is not 'at the mercy of' the parties . . . nor dependent on the usual rules governing settlement of private litigation" (*Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 670 (1944)).

Given the District Court's findings, this preliminary injunction was necessary to prevent the immediate consummation of petitioner's anticompetitive scheme, which violated both sections 1 and 2 of the Sherman Act. Otherwise, petitioner would succeed in thwarting altogether the prosecution of two of the antitrust claims here, and crippling the prosecution of the third. Thus the District Court concluded:

"That the public interest in protection of competition requires the issuance of a preliminary injunction; that the paramount national interest requires court intervention by a preliminary injunction herein; that the failure to issue such injunction will deprive the Court of full and effective jurisdiction of the said federal antitrust claims . . . and will impair, obstruct, or render fruitless the Court's determination of said claims; and that a preliminary injunction as provided herein is necessary to protect the jurisdiction of this Court . . . ." (App. 267).

And Mr. Chief Justice Stone said it all when he stated, on behalf of a unanimous Court in *Sola Electric*:

"Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements" (317 U.S. at 177).

#### IV.

#### **THIS INJUNCTION IS NOT PRECLUDED BY RESPONDENTS' FAILURE TO PRESS THEIR FEDERAL ANTITRUST DEFENSE IN THE STATE COURT ACTION.**

At the very outset of this litigation, respondents, "in an effort to avoid a needless duplication of lawsuits between the parties" (App. 13), removed the entire action to the federal District Court (the only court which could have tried all the issues in the case). Separate lawsuits in the state and federal courts were made necessary only by petitioner's refusal to waive its objections to removal.\* Once petitioner made that decision, there was no question but that a *separate* federal action would be required to try respondents' injunctive and treble damage claims. (This fact alone negates any suggestion that the withdrawal of respondents' federal defense from the state action was a mere "tactical" attempt to get two bites at the apple.)

When the case was remanded to the state court (September 23, 1965), the respondents filed three separate de-

\* Petitioner's objections could have been waived. See 1A Moore's Federal Practice, §0.157[11] at n.29 (1974 ed.).

fenses in that court based on the Illinois and federal antitrust laws (October 20, 1965). The following day, they filed the present action in the federal District Court.

It was understood by the parties and by the District Court that a federal trial of respondents' antitrust claims would take place after the conclusion of the state court suit—regardless of who prevailed there—in order to avoid the "physical impossibility" of trying two complex lawsuits at once (App. 260-65). In its Reply In Support of Petition, petitioner again reflected the consistent understanding of the parties that the trial of respondents' treble damage claims would inevitably proceed. It stated:

"The jurisdiction of the federal courts to adjudicate treble-damage claims . . . is not disputed. The issue here relates to the federal courts' power to *enjoin* state court proceedings (and, more specifically, enforcement of final state court judgments)—not what effect the state court proceedings or judgments may have on respondents' *treble-damage* action." (p. 8; emphasis petitioner's.)

Yet the plain fact is that, absent the injunction, federal treble damage claims will be defeated (*supra*, pp. 47-50). Thus, petitioner's argument boils down to the untenable proposition that, although respondents' right to proceed with their treble damage claims is conceded, they have no right to the equitable relief which is necessary to preserve the trial of those claims, because of the dismissal of their federal antitrust defense from the state action.

The facts surrounding that dismissal are pertinent. It was only *after* the state trial judge refused to reinstate their antitrust defenses (September 11, 1970) that the respondents requested the dismissal *without prejudice* of their federal antitrust defense as well, hoping thus to

avoid piecemeal, duplicative litigation of complex antitrust issues.\* There being no objection by petitioner, this motion was granted (App. 82). Obviously, under such circumstances, the dismissal *without prejudice* envisioned nothing less than a full preservation of respondents' rights to assert their federal antitrust issues in the federal court action.

Dismissal of the federal defense was also spurred by the same considerations of comity which petitioner claims have been ignored. District Judge McGarr, then presiding over this case, indicated that the simultaneous pendency of these federal antitrust issues in both state and federal courts "presents a conflict in the comity between our bipartite judicial system" (App. 82). When he was informed of the dismissal of the federal antitrust defense in the state case, he said,

"This was undoubtedly done in consideration of this court's expressed reluctance to consider the cause of

---

\* The first Appellate Court decision held the state antitrust issues inapplicable under the doctrine of federal preemption—a palpably erroneous ground, as petitioner now candidly acknowledges (Pet. Br. 29 n.13). When the trial court refused to reinstate the state antitrust defenses and counterclaim in light of an intervening legislative amendment (*supra*, p. 21), the state defendants confronted the prospect of litigating their appeal to the Appellate Court and ultimately to the Illinois Supreme Court or to this Court, securing a third trial at which to litigate their state antitrust defenses and counterclaim.

Thereafter, respondents faced the inevitable prospect of having to try their treble damage claims in federal district court, making a total of three trials on complex antitrust issues against a litigious, deep-pocketed adversary.

action here while the same issue was pending between the same parties in the state court case." (App. 85.)\*

Indeed, the dismissal of the antitrust defense from the state action *lessened* the risk of "insult to the processes of a state judicial system" (Pet. Br. 38). For if the state court had proceeded to a decision on ultimate legal issues of federal antitrust liability, that decision would certainly have been subject to redetermination in the federal court, under the doctrine of *Lyons, supra*. Surely that would have been much more offensive than the present situation, which merely involves a temporary "standstill" order, *pendente lite* (App. 264).

And how can all three respondents be denied the right to proceed on their federal antitrust *claims* by virtue of the dismissal, without prejudice, by two respondents of a *defense* in the state action—a defense whose adjudication by the state courts would have been neither *res judicata* nor in any way binding on the federal court? (*Lyons, supra*, 222 F.2d at 189).

---

\* Judge McGarr, after receiving briefs on the question of *res judicata*, concluded that respondents' federal antitrust case "encompasses issues which are broader than any presented in the [state court] anti-trust defense." Accordingly, he concluded that "plaintiff cannot be precluded from asserting its anti-trust cause of action in the federal court" (App. 92).

Indeed, respondents' Amended and Supplemental Complaint (App. 124), on the basis of which preliminary relief was sought, alleged numerous actionable facts which were not in existence at the time the antitrust defense was withdrawn. It is difficult to understand how, by withdrawing their federal *defense* without prejudice and without objection, the respondents could have waived their right to a full assertion of an antitrust *claim* based in part on actionable facts which could not have been included in that defense at the time it was dismissed.

*England v. Louisiana Medical Examiners*, 375 U.S. 411, 421-22 (1964), approved practically the same procedure followed here: reservation of federal constitutional claims for adjudication in a federal court following the state court's determination of state law issues. It applies *a fortiori* in the case of federal antitrust claims, whose adjudication Congress entrusted exclusively to the federal courts. Nor should it matter that respondents were remanded to the state court by virtue of petitioner's refusal to waive its objections to removal, rather than by virtue (as in *England*) of the federal court's own application of the doctrine of abstention.

Further, the present situation, in which a preliminary injunction is required to preserve the respondents' right to a federal trial, has occurred only because the federal court, *by agreement of the parties*, stayed its hand in order to let the state trial conclude first. As Judge McLaren said,

"I understood that *the parties had agreed* and that [petitioner's counsel] was in entire agreement that there would not be any effort, that it would be an undue burden on both sides, to try to carry on both suits concurrently. *I certainly would not have held off for three years on the trial of the case before me if I had known that there was any question in his mind that somehow the plaintiff here is waiving any rights by continuing the matter, and the Court was in some way giving the defendant an advantage by letting it proceed in the state proceeding and holding the matter up here . . . .* I didn't think that there was anything in anybody's mind to the contrary. After all of this time and after all of the numbers of times that we have had status reports, it comes as a very severe shock to me, and I must say that I am very disappointed and very chagrined that I didn't simply force this case to go ahead along with other cases." (App. 264-65; see also App. 260-264).

Judge McLaren summed up the matter succinctly when he told petitioner: "Well, you had a chance as plaintiff to select your forum for the charges you made. I think that they had an equal right to choose their forum for the charges that they made" (App. 263). Indeed, respondents could have litigated their antitrust claims *only* in a federal forum.

Where the federal Court has stayed its hand because of such an understanding on the part of the Court and the litigants, it would be utterly unjust now to penalize respondents, not to mention the public interest, simply because they withdrew their federal antitrust defense *without prejudice* under the circumstances stated.

*Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944), held that a defendant could pursue a federal antitrust counterclaim even though it had failed to raise the antitrust violation as a defense in a prior related litigation between the same parties. Citing the public interest embodied in the federal antitrust laws, the Court declared:

"And the determination of that policy is not 'at the mercy of' the parties . . . nor dependent on the usual rules governing the settlement of private litigation." (*Id.* at 670).

The most that can be said of respondents' failure to press their federal antitrust defense in the state court is that they thereby permitted the entry of a final Supreme Court judgment. Petitioner cannot escape the fact that his is not a private action but one in which plaintiffs act as private attorneys general to enforce the salutary provisions of the Sherman Act. Nor can petitioner escape the finding of the Courts below (1) that the agreements on which those judg-

ments were based violated the Sherman Act, and (2) that the procurement of judgments based upon those agreements was part and parcel of the scheme to violate the antitrust laws. Therefore the enforcement of those judgments would *enforce the unlawful agreements* and consummate the anticompetitive scheme in violation of Sections 1 and 2 of the Sherman Act.

Thus the pronouncement of Mr. Chief Justice Stone in *Sola Electric supra*, is directly in point:

"Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements" (317 U.S. at 177).

## V.

### THE DISTRICT COURT DID NOT REVERSE, REVIEW OR REVISE THE STATE COURT DECISION BY COLLATERAL ATTACK OR OTHERWISE.

Petitioner's final argument is that the District Court had no jurisdiction to review the final judgments of the Illinois courts. But the District Court recognized that it had no such jurisdiction, citing the very case (*Rooker*) on which petitioner relies (App. 226 n.1, 232; Pet. Br. 39). The simple fact here is that the federal courts did not reverse any state court determination. In ruling that petitioner's anticompetitive agreements and other conduct were illegal under the Sherman Act, the District Court was passing on a question of federal law which was totally independent of the determination made by the state courts—which in-

volved purely state law issues. *E.g.*, *Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948). What the District Court reviewed was not the Illinois judgments themselves, but *rather petitioner's anticompetitive conduct in procuring those judgments*:

"[T]he state court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anticompetitive scheme" (App. 232).

The Court of Appeals quoted and approved what the District Court said with respect to such limited examination of the state proceedings (App. 289).

We have repeatedly stated what the District Court found upon that examination, namely, that the state court litigation which resulted in the judgments was predicated and depended upon illegal agreements and was part of an anticompetitive scheme in violation of Sections 1 and 2 of the Sherman Act (*supra*, pp. 43-47). One is sorely pressed to understand how judgments procured as a part of a scheme to violate that Act are "entitled to full faith and credit" (Pet. Br. 41) in the very federal court exclusively charged with the enforcement of that Act. In reality, petitioner says it is entitled to the fruits of its illegal enterprise, federal or any other law to the contrary notwithstanding. We could discuss this in greater detail, but deem it unnecessary. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177 (1942); *Schine Chain Theatres, supra*, 334 U.S. at 119; *Lyons, supra*, 222 F.2d at 189.

## CONCLUSION

---

Petitioner violated Sections 1 and 2 of the Sherman Act by agreements violative of Section 1 and monopolistic practices violative of Section 2. It employed the state court to enforce its illegal agreements and further its monopolistic practices, making false claims in furtherance of its anti-competitive objective. Thus, not only was its objective illegal, but so also were the means it employed. It had used the courts before for this purpose. While unsuccessful in the courts of Georgia (*supra*, pp. 19-20), its illegal enterprise, after two rebuffs by the Appellate Court of Illinois (*supra*, pp. 18, 23-24), finally proved successful in the Supreme Court of Illinois to the tune of over seven and one-half million dollars, in a case where the original *ad damnum* was \$500,000 (App. 9, 10). By writ of execution it now seeks the \$7,500,000.00 fruits of that illegal enterprise.

Success does not sanctify illegal enterprise nor put it outside the pale of law. Notwithstanding, petitioner boldly asserts that no Chancellor's writ can stay the consummation of that illegal enterprise, even though that consummation violates the public policy of one of the most important federal statutes in the land, and even though that consummation would deny a courtroom to two parties entrusted with the role of private attorneys general to enforce that public policy, and seriously jeopardize the day in court of the third party so entrusted, now represented by his widow as administrator of his estate.

The law has witnessed many vagaries. Few match this "classic example" of one "who seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged [and found by the District Court] to be the very object of antitrust violations" (App. 286). We respectfully submit that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

**BARNABAS F. SEARS**

One IBM Plaza  
Chicago, Illinois 60611

**JAMES E. S. BAKER**

One First National Plaza  
Chicago, Illinois 60603

*Attorneys for Respondents*

**Thomas L. Brejcha, Jr.**

**Richard P. Rosenberg**

**BOODELL, SEARS, SUGRUE,  
GIAMBALVO & CROWLEY**

One IBM Plaza - Suite 2650  
Chicago, Illinois 60611

**James A. Hardgrove**

**Clifford E. Yuknis**

**SIDLEY & AUSTIN**

One First National Plaza - Suite 4700  
Chicago, Illinois 60603

*Of Counsel*

November 27, 1976

## ADDITIONAL APPENDIX A

---

### Additional Statutes Involved

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. \* \* \*

Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2, provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. \* \* \*

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

---